Supreme Court, U.S.
FILED
(2)
AUG 6 - 2004
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No. 04 193

In The

Supreme Court of the United States

MOHAMAD Y. HAMMOUD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether a district court violates the Fifth and Sixth Amendments by relying upon facts (other than the fact of a prior conviction) that increase the maximum sentence dictated by the United States Sentencing Guidelines when those facts were not charged in the indictment and neither found by the jury on proof beyond a reasonable doubt (and subject to the admissibility requirements of the Federal Rules of Evidence) nor admitted by the defendant.

2. Whether a district court violates the Fifth and Sixth Amendments by relying upon facts found by a preponderance of the evidence (and without regard for the admissibility requirements of the Federal Rules of Evidence) to apply a section of the United States Sentencing Guidelines, such as Section 3A1.4, that requires proof of elements not found in the underlying criminal statute and increases the sentence above the maximum sentence found in the underlying criminal statute.

3. If the answer to the first or second question is "yes," the following question is presented: What role do the Sentencing Reform Act of 1984 (and specifically 18 U.S.C. § 3552), the United States Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal sentencing practice.

4. If the answer to the first or second question is "yes," the following question is presented: May the Government re-indict Petitioner or convene a sentencing jury to correct the Constitutional violation(s) in light of the Double Jeopardy Clause, the Due Process Clause and *United States v. Jackson*, 390 U.S. 570 (1968).

5. Is Petitioner's sentence under the United States Sentencing Guidelines so disproportional to the maximum sentences found in the underlying criminal statutes that it violates the Due Process Clause.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MOHAMAD Y. HAMMOUD,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Mohamad Y. Hammoud, through his counsel of record, petitions for a writ of certiorari in a case pending on appeal to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The published order of the United States Court of Appeals for the Fourth Circuit (Case No. 03-4253) affirming the judgment (and sentence) of the United States District Court for the Western District of North Carolina (Docket No. 3:00CR147-1-MU) and holding that "*Blakely v. Washington* ... does not operate to invalidate Hammoud's sentence under the Federal Sentencing Guidelines" was filed on August 2, 2004. App., *infra*, 1. The order can be

found at http://pacer.ca4.uscourts.gov/opinion.pdf/034253OR.P.pdf. The district court's order regarding sentencing was not published, but a transcript of the sentencing hearing has been reproduced in the Appendix. App., *infra*, ___.

JURISDICTION

The district court imposed sentence on February 28, 2003 and entered judgment on March 18, 2003. App., *infra*, 3. Petitioner filed a notice of appeal on March 7, 2003. App., *infra*, 15. After multiple rounds of briefing and oral argument in the Fourth Circuit, including oral argument before the *en banc* court, the Fourth Circuit published an order affirming the judgment of the district court and denying Petitioner relief with respect to sentencing. Petitioner has not sought rehearing before the Fourth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e) pursuant to Sup. Ct. R. 11.

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES INVOLVED

The constitutional provisions involved are:

U.S.C.A. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.C.A. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The statutes and United States Sentencing Guidelines involved are set forth in the Appendix. App., *infra*, 52.

STATEMENT

1. The District Court Proceedings

A. The Indictments

On July 31, 2000, Petitioner and sixteen other defendants were named in an indictment. R. 184-212. The indictment charged Petitioner with immigration fraud in violation of 8 U.S.C. § 1325(c) and 18 U.S.C. § 1546 (Counts 1 and 2); conspiracy to smuggle cigarettes in violation of 18 U.S.C. §§ 371 and 2342 (Count 35); and money laundering in violation of 18 U.S.C. §§ 1956(h) (Count 36). *Id.* On March 28, 2001, a superseding indictment charged Petitioner, Said Harb, and others (defined in the indictment as the "Charlotte Hizballah cell") with constituting a RICO enterprise that had engaged in immigration fraud, cigarette smuggling, credit card, mail fraud, wire fraud, money laundering and bribery in order to, among other things, "provide some of the illegal proceeds of the enterprise to Hizballah, a designated foreign terrorist organization" (Count 71). R. 259-76. The superseding indictment also charged Harb, Ali

Amhaz, Mohamad Dbouk, and Hassan Laqis with conspiring to use fraudulent credit cards to purchase military or "dual use" items in Canada for Hizballah, thereby providing material support or resources to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B (Count 72). *Id.* The superseding indictment alleged that Harb, Amhaz, and Dbouk provided additional services to Hizballah, including wiring money to accounts held by Hizballah operatives, obtaining fraudulent identifications for Hizballah procurement activities, and evaluating life insurance for Hizballah operatives killed in the course of terrorist attacks. *Id.*

In February 2002, Harb entered into a sealed plea agreement in which he pleaded guilty to conspiracy to commit immigration fraud, conspiracy to smuggle cigarettes, conspiracy to launder money, RICO, and conspiracy to provide material support to a designated foreign terrorist organization. R. 440. He stipulated to upward adjustments under the United States Sentencing Guidelines ("Guidelines"). All totaled, his offense level was 28, which yielded a Guideline range of 78 to 97 months. *Id.* Ultimately, by testifying against Petitioner, Harb was able to reduce his sentence to less than 4.5 years.[1]

On March 12, 2002, a second superseding indictment added Petitioner and Sheik Abbas Harake, who was described as a Hizballah military commander living outside Beirut, Lebanon, to the list of alleged co-conspirators in Count 72. R. 461-502. Specifically, the second superseding indictment alleged that Petitioner used his position as the leader of a group of Lebanese nationals in Charlotte to support and raise funds for violent Hizballah activity in Southern Lebanon; that he held meetings to solicit funds for Hizballah; and that he sent "unknown thousands of

[1] The stark contrast between Harb's 4.5 year sentence and Petitioner's 155 year sentence is enlightening about how the Guidelines can be manipulated to achieve dramatically different results.

dollars" to Hizballah operatives in Lebanon, including Harake and Shaykh Fadlallah. *Id.* It also alleged that Petitioner provided material support to a designated foreign terrorist organization (Count 78). *Id.*

B. The Trial

The central activity that drove almost all of the alleged offenses was cigarette smuggling. The cigarette smuggling operation, which was conducted by the sixteen defendants (most Lebanese nationals) thrived by purchasing cigarettes at 50 cents per carton tax in North Carolina, then delivering them to Michigan, where they were generally sold at a discount to the $7.50 per carton Michigan tax. R. 464. Profits derived from the smuggling operation sometimes went to a Michigan account in a false name and were then transferred to an account in the same name in North Carolina. Petitioner and his American wife/co-conspirator Angela Tsioumas, had joint authority over those accounts.

Tsioumas, who testified against her husband pursuant to a plea agreement, testified that she was not a member of a "Charlotte Hizballah cell;" had never been a member of Hizballah; and had never given any money to Hizballah. R. 2015-17. Like Tsioumas, none of the other members of the alleged "Charlotte Hizballah cell" testified that they were members of Hizballah or that the purpose of the cigarette smuggling was to support Hizballah. Indeed, no fact witness testified that the purpose of the cigarette smuggling was to obtain money for Hizballah.

Harb, the Government's star witness, testified that he was not a member of Hizballah. R. 2806. He testified that Petitioner had told him that the charitable donations made by Petitioner and others were sent to Harake, an alleged military commander for Hizballah in Beirut. R. 2760. Harb "corroborated" this claim by testifying that he had once carried $3,500 intended for Harake to Beirut at Petitioner's

request. R. 2763-64. However, Harb testified that he never delivered the money to Harake even though he spoke with him by telephone while he was in Lebanon. R. 2764-66. Instead, Harb gave the envelope to his *mother* for delivery to Petitioner's mother without ever mentioning Harake. R. 2765. Neither Harb nor any other witness provided evidence that the money reached Harake, yet this was the sole financial transaction supporting Counts 72 and 78 against Petitioner. With respect to procuring dual-use technology in Canada, Harb testified that Petitioner was not involved. R. 2685-86, 2734-49, 2860.

Petitioner testified in his defense. He testified to being born in the Bourj Al-Barajneh, a poor neighborhood of Beirut that has suffered from militia occupation by the Palestinians, who left when the Israelis invaded, followed by Amal, then Hizballah. R. 3040-43. Petitioner openly acknowledged his sympathies with Hizballah's humanitarian efforts in Lebanon and its effort to expel the Israeli army from Lebanon. R. 3077-78. He indicated that he was in the United States because his brother had told him how good it is here. R. 3050-51.

Although Petitioner admitted that he had received many requests for money for the Lebanese Resistance from Abu Adham, he testified that he had never sent Adham any money. R. 3070. Petitioner also admitted that Harake, who had been his next door neighbor in Lebanon since he was a child, is a member of Hizballah. R. 3076. However, Petitioner denied ever sending money to Harake. R. 3076-77. He further denied ever giving Harb money to send to Harake, his mother or anyone else.

Petitioner testified that Fadlallah is a worldwide spiritual leader for Shi'a Muslims, not a member of Hizballah, and has been in conflict with Hizballah over the last several years. R. 3071-72. Petitioner admitted sending him money in 1994, when Fadlallah was not on any terrorist

list, but sent none after it became illegal to do so. R. 3074. The Government presented no evidence to the contrary.

C. The Jury Verdict

After a three-week trial, the jury began its deliberation. Count 71 (RICO) charged the enterprise with four purposes, only one of which involved Hizballah. In response to a question from the jury, the district court instructed the jury that it had to agree unanimously on one or more of the four purposes, but it was not required to agree unanimously on all four purposes or any particular one. R. 3626-29.

On the third day of deliberations, the jury asked "[D]o we have to find one conspiracy or a conspiracy out of multiple (sic) utilizing only some of the manner and means of conspiracy." R. 3648. The district court instructed the jury that in order to convict on Count 72 (conspiracy to provide material support), it must find that "that there was a single conspiracy, not multiple conspiracies. Multiple conspiracies with a common goal. Not what was charged." R. 3648. This instruction conflated the separate conspiracies into one. At approximately 3 p.m. that afternoon, the jury indicated that it could not reach an agreement on Count 72; the District Court responded with an *Allen* Charge. R. 3641-44. The jury emerged with the verdict form at 5:20 p.m. that day. R. 3650. The verdict form asked the jury to vote guilty or not guilty on each offense and contained no special interrogatories. The jury found Petitioner guilty on Counts 1 and 2 (immigration fraud), 35 (conspiracy as to cigarette smuggling), 36 (conspiracy as to money laundering), 37 and 41 (cigarette smuggling), 43 and 49 (money laundering), 53, 54, and 55 (credit card fraud and conspiracy as to same), 71 (RICO), 72 (conspiracy to provide material support), and 78 (material support). *Id.*

D. The Sentencing

On February 28, 2003, Petitioner was sentenced to 1,860 months imprisonment in accordance with the recommendations of a Presentence Investigation Report ("PSR") first prepared on October 31, 2002. App., *infra*, 49. As an initial matter, the PSR grouped all of the offenses for Guideline calculation purposes and used the most serious offense to establish the base offense level. R. 836. According to the PSR, the most serious offense was the violation of 18 U.S.C. § 2342 (conspiracy to smuggle cigarettes) because under U.S.S.G. §§ 2E4.1 and 2T4.1, the base offense level was determined by reference to the amount of tax evaded. *Id.* With respect to this issue, the PSR concluded that the "conspiracy involved more than $2,500,000 in taxes evaded." Pursuant to U.S.S.G. § 2T4.1(J), it found that the base offense level was 24.[2] *Id.*

To the base offense level of 24, the PSR added another (1) two points under U.S.S.G. § 2S1.1(b)(2)(B), because Petitioner was convicted of violating 18 U.S.C. § 1956, (2) two points under U.S.S.G. § 2S1.1(b)(3) for "sophisticated [money] laundering," (3) four points under U.S.S.G. § 3B1.1 for being a "leader and organizer," and (4) two points under U.S.S.G. § 3C1.1 for "obstruction of justice." R. 837-38. The PSR then increased the resulting offense level of 34 by another 12 points pursuant to the terrorism enhancement in U.S.S.G. § 3A1.4. R. 3691-92, 3706. U.S.S.G. § 3A1.4 also increased Petitioner's criminal history category from a I to a VI, despite the fact that Petitioner had no prior offenses. *Id.* The end result was a base offense level of 46 and a criminal history category VI, which yielded a Guideline range of "life." R. 3706.

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[2] Elsewhere, the PSR referred to a tax loss of "over $3 million dollars" and "in excess of $4 million dollars." R. 833-34. The PSR did not reconcile these internal inconsistencies.

The maximum sentences authorized by the statutes setting forth the various offenses for which Petitioner was convicted ranged from 60 to 240 months. Rather than limit the sentence to the statutory maximum of the most significant offense, the district court imposed the maximum sentence for all but two offenses[3] and then "stacked" them to reach the "life" sentence mandated by the Guidelines. App., *infra*, 52. Thus, the district court imposed consecutive 240 month sentences on Counts 36, 43, 49 and 71, consecutive 120 month sentences on Counts 2, 54, 55, 72 and 78, and consecutive 60 month sentences on Counts 1, 35, 37, 41, 53. *Id.* at 49. The district court handed down the 1,860 month (155 years) sentence because it believed that it was "required by law." *Id.* at 49.

2. The Court of Appeals Proceedings

After an initial round of briefing, a three-judge panel of the Fourth Circuit heard oral argument on May 4, 2004. On June 30, 2004, the Fourth Circuit ordered supplemental briefing and a rehearing *en banc* on the impact of *Blakely v. Washington*, 124 S. Ct. 2531 (2004), on the sentencing issues raised by Petitioner. Oral argument before the *en banc* court was held on August 2, 2004. That same day, the Fourth Circuit published an order affirming the judgment of the District Court and holding that *Blakely* "does not operate to invalidate Hammoud's sentence under the Federal Sentencing Guidelines." App., *infra*, 1. The order directed district courts within the Circuit to continue sentencing defendants pursuant to the Guidelines, but pending a definitive ruling by the Supreme Court, also announce an alternative sentence pursuant to 18 U.S.C. § 3553(a) treating the Guidelines as "advisory only." *Id.*

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[3] The district court imposed 120 month, rather than 180 month, sentences on Count 72 and 78.

REASONS TO GRANT THE PETITION

In *Blakely*, this Court reaffirmed that the Sixth Amendment's right to a jury trial includes the right to have a jury determine that the Government has proved beyond a reasonable doubt all facts legally essential to the sentence imposed. *Blakely*, 124 S. Ct. at 2533 . By most accounts, this reaffirmation created serious ripples in the previously still waters of the federal sentencing scheme. See, e.g., *United States v. Penaranda*, 2004 WL 1551369 (2nd Cir. July 12, 2004) ("*Blakely* not only casts a pall of uncertainty on more than 22,000 federal sentences imposed since Apprendi was decided ..., but it also raises the prospect that many thousands of future sentences may be invalidated. . . ."); *United States v. Gonzalez*, 2004 WL 1444872 (S.D.N.Y. June 28, 2004) ("Needless to say, Blakely calls into question the long-standing practices of federal courts in implementing the United States Sentencing Guidelines"). Petitioner is aware that this Court granted certiorari this week in *United States v. Booker*, 2004 WL 1535858 (7th Cir. July 9, 2004), *cert. granted*, 2004 WL 1713654 (August 2, 2004) and *United States v. Fanfan*, 2004 WL 1723114 (D.Me. June 28, 2004), *cert. granted*, 2004 WL 1713655 (August 2, 2004) both of which present questions related to *Blakely*'s impact on the Guidelines. Petitioner argues that this case is an appropriate, indeed necessary, companion to *Booker* and *Fanfan* because of the breadth and uniqueness of the issues this case presents.

1. This Case Allows The Court To Address A Wide Range of *Blakely* Issues

The core *Blakely* issue in both *Booker* and *Fanfan* is the district court's determination regarding drug quantity. See *Booker*, No. 04-104, Petition for a Writ of Certiorari, p. 2-7; *Fanfan*, No. 04-105, Petition for a Writ of Certiorari, p. 7. By contrast, this case presents six different *Blakely* issues. Based upon proof by a preponderance of the evidence (and

without regard for the admissibility requirements of the Federal Rules of Evidence), the district court found (1) that Hizballah was a 'terrorist organization and that Petitioner had committed a federal crime of terrorism with the specific intent to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct; (2) that Petitioner had evaded taxes in excess $2.5 million; (3) that Petitioner had obstructed justice; (4) that Petitioner had engaged in sophisticated money laundering; and (5) that Petitioner had occupied a leadership or organizing role in the underlying conspiracy. The district court then "stacked" multiple maximum statutory sentences to reach the "life" sentence dictated by the Guidelines. Each aspect of this judicial debacle allows the Court a distinct opportunity to provide lower courts with guidance about the real-world impact of *Blakely*.

2. This Case Allows The Court To Address *Blakely*'s Impact On Un-Charged Crimes

In *Fanfan*, No. 04-105, the district court's reliance on facts not charged in the indictment and not proved to the jury beyond a reasonable doubt would have increased Fanfan's sentence by a factor of 3 (from a Guideline range of 63 to 78 months to a Guideline range of 188 to 235 months). See *Fanfan*, No. 04-105, Petition for a Writ of Certiorari, p. 3-4. In this case, the district court's reliance on facts not charged in the indictment and not proved to the jury beyond a reasonable doubt increased Petitioner's sentence by a factor of more than 30 (from Guideline range of 46 to 57 months to a Guideline range of "life," which the district court imposed in the form of a 1,860 month sentence). This jaw-dropping increase in Petitioner's sentence is primarily the result of the district court's application of U.S.S.G. § 3A1.4, which in and of itself increased Petitioner's base offense level by 12 and shifted his criminal history category from a I to a VI.

To apply Section 3A1.4, the district court had to find (1) that Hizballah was a terrorist organization and (2) that Petitioner committed a "federal crime of terrorism," which requires specific intent to "influence or affect the conduct of government by intimidation or coercion" even though neither fact was charged in the indictment nor presented to the jury. This fact-finding resulted in Petitioner being sentenced for an entirely different crime (violation of U.S.S.G. § 3A1.4) with an entirely different *mens rea* than the one for which he was convicted by the jury (violation of 18 U.S.C. § 2339B).

The only mental state requirement in 18 U.S.C. § 2339B is that the defendant must "knowingly" provide material support or resources to a foreign terrorist organization. 18 U.S.C. 2339B. The district court instructed the jury that a defendant acts knowingly when "he was conscious and aware of his action, realized what was happening around him, and did not act because of ignorance, mistake or accident." R. 3315. The district court's instructions did not even require the jury to find that Petitioner had knowledge that his conduct was unlawful.[4] The district court, however, went beyond the jury verdict to find that Petitioner specifically intended to affect the conduct of government by intimidation or coercion or to retaliate against government conduct based upon literature found in Petitioner's home (R. 2248-2301), selected videotape excerpts of Hizballah (*id.*), and unsupported allegations about attacks by Hizballah on Americans and Western Europeans (R. 3091-3100). The district court did not even bother to enumerate which clause in U.S.S.G. § 3A1.4 ("intended to affect" or "retaliate against") it was basing its finding on or which "government" it believed that

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[4] Contrast *United States v. Kent*, 912 F.2d 277, 280-81 (9th Cir. 1990), *op. withdrawn and superseded on reh'g by*, 945 F.2d 1441 (9th Cir. 1991) (reading "knowingly" as requiring knowledge of unlawfulness of conduct where statute criminalizes broad range of apparently innocent conduct); *Liparota v. United States*, 471 U.S. 419, 426 (1984) (same).

Petitioner intended to affect or retaliate against. Concern for this type of judicial fact-finding was at the core of the Court's holding in *Blakely*:

> "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish."

Blakely at 2539 (emphasis in original). This case provides the perfect vehicle for the Court to address the impact of *Blakely* on un-charged crimes.

3. This Case Allows The Court To Address *Blakely*'s Impact On Base Offense Level Calculations And Enhancements

To determine Petitioner's base offense level, the district court blindly adopted the PSR's conclusion that the conspiracy caused a tax loss of greater than $2.5 million. R. 837. This conclusion was apparently based on documents in the United States Attorney's discovery file, interviews with un-named agents, and untested estimates. *Id.* At trial, the district court had defined "contraband cigarettes" for the jury as "a quantity in excess of 60,000 cigarettes which bear no evidence of the payment of applicable state cigarette taxes ...." R. 3315. Thus, even if each of the three convictions related to 18 U.S.C. § 2342 (Counts 35, 37, 41) involved different contraband cigarettes, the only fact fully supported by the jury's verdict is that Petitioner sold 180,003 cigarettes, which is equivalent to 900 cartons of cigarettes. At $7.50 tax per carton,[5] the only fact fully supported by the jury's verdict is that Petitioner avoided $6,750 in taxes. Under U.S.S.G. § 2T4.1, a tax loss of $6,750

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[5] $7.50 tax per carton is the assumption used in the PSR. R. 833.

yields a base offense level of 10. With a criminal category history I, a base offense level of 10 translates into a Guideline range of 6 to 12 months. Nevertheless, the district court, rather than the jury, found that Petitioner avoided more than $2.5 million in taxes and thereby raised his base offense level under U.S.S.G. § 2T4.1 from a 10 to a 24. Had the jury been asked to find a specific amount of tax loss, they would have had to consider the considerable evidence that the Government failed to take into account legitimate sales of cigarettes for which tax was paid. For example, when the sentencing of Petitioner's brother and alleged co-conspirator Chawki Hammoud, the district court accepted evidence introduced at trial that a significant amount of tax (at least $1 million) was paid and therefore a significant credit was due. R. 2175.

The district court increased Petitioner's sentence for "obstruction of justice" under U.S.S.G. § 3C1.1 based upon the spurious allegations in the PSR that Petitioner attempted to destroy evidence, harm the prosecutor, and committed perjury when he testified at trial. The Government admitted that the jailhouse snitch who claimed Petitioner conspired to harm the prosecutor was unreliable, and had likely falsified evidence; nonetheless, the district court found this sufficient to provide support for an enhancement by a preponderance of the evidence.

The district court also increased Petitioner's sentence for "sophisticated [money] laundering" under U.S.S.G. § 2S1.1(b)(3) and for having an "leadership/organizing" role in the conspiracy under U.S.S.G. § 3B1.1. If the jury had been asked to determine the latter issue, it may well have concluded that Petitioner did not have a leadership role as the conspiracy was in place long before Petitioner became involved.

4. This Case Allows The Court To Address *Blakely*'s Impact On "Stacking"

Both *Booker* and *Fanfan* involve convictions on a simple drug charge. In contrast, this case involves multiple convictions and "stacking" - the imposition of consecutive sentences for multiple offenses to reach the sentencing range dictated by the Guidelines. The maximum sentence allowed by statute for any one of the offenses for which Petitioner was convicted was 240 months (20 years). However, Petitioner's sentence was 1,860 months (155 years) because the district court imposed the maximum statutory sentence for all but two of the offenses and then made them run consecutively so as to bring the sentence within the "life" range under the Guidelines. This draconian approach to sentencing merits special consideration in light of *Blakely*. Where, as here, the sentence dictated by the Guidelines exceeds the maximum sentence that is authorized by statute for the most serious offense, the effect of the Guidelines is to impose a sentence that exceeds the statutory maximum for the offense that drives the sentence. In this case, U.S.S.G. § 3A1.4, intended to punish crimes of terrorism, called for a sentence of "life" even though the most serious terrorism offense for which Petitioner was convicted (18 U.S.C. § 2339B) carries a maximum penalty of fifteen years unless the death of any person results from the terrorism. 18 U.S.C. § 2339B(a)(1). In this case, no such death was alleged or proved at trial or at sentencing. Nonetheless, Petitioner's 18 U.S.C. § 2339B conviction resulted in a "life" sentence.

5. This Case Avoids The Peculiarities Of 21 U.S.C. § 841

Booker and *Fanfan* have little bearing on other federal criminal cases because the sentencing scheme at issue in those cases involves the escalating statutory maximums and statutory minimums contained in the federal drug statute, 21 U.S.C. § 841. Like the criminal statutes at issue in this

case, most federal criminal statutes simply state a statutory maximum and leave the sentencing calculation up to the Guidelines. Consequently, this case allows this Court to address *Blakely's* impact on the most common form of federal criminal statutes. Because this case is not a drug case, it also avoids the circuit conflict on the question of whether drug quantity is statutorily defined as an element of the Section 841 offense. See generally Brief *Amici Curiae* of National Association of Criminal Defense Lawyers and National Association of Federal Defenders at 17-18, *Booker*, No. 04-104, *Fanfan*, No. 04-105, *United States v. Bijou*, No. 04-2572,

6. This Case Allows The Court To Address The Appropriate Remedy For *Blakely* Violations

Circuit courts and district courts have proposed a number of different remedies for *Blakely* violations. See *United States v. Ameline*, 2004 WL 1635808 (9th Cir. July 21, 2004) (noting that the district court may convene a "sentencing jury" on remand); *United States v. Zompa*, 2004 WL 1663821 (D. Me. July 26, 2004) (applying Guidelines sans enhancements based on facts not admitted by defendant); *United States v. King*, 2004 U.S. Dist. LEXIS 13496 (M.D. Fl. July 19, 2004) (sentencing defendant within range established by statute but using Guidelines for guidance); *United States v. Landgarten*, 2004 WL 1576516 (E.D.N.Y. July 15, 2004) (scheduling a "sentencing jury trial" to decide enhancement factors beyond a reasonable doubt); *United States v. Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004) (sentencing defendant within range established by statute); see also *United States v. Thompson*, 2004 U.S. Dist. LEXIS 13213 (S.D. W.Va. July 14, 2004) (unpublished) (postponing all sentencing hearings until after October 15, 2004 "in the interests of justice."). Although all of these remedies have flaws, sentencing juries may implicate additional Constitutional concerns. *Zompa*, 2004 WL 1663821 (D. Me. July 26, 2004) ("In this case, the drug

quantity enhancement was not included in the Information to which the Defendant pled guilty, nor did the Defendant admit to distributing any particular amount of cocaine base. Multiple constitutional principles, including Due Process and Double Jeopardy, may ... prevent[] the Government from now seeking to prove beyond a reasonable doubt that this Defendant can be held accountable for distributing 15.3 grams of cocaine base."). But see, *Ameline*, 2004 WL 1635808 (9th Cir. July 21, 2004) ("Unless the facts sought to be proven by the government to enhance Ameline's sentence constitute elements of a statutory offense required to be alleged in the original indictment, the constitutional prohibition of double jeopardy would not be implicated."). This Court's decision in *United States v. Jackson*, 390 U.S. 570 (1968), also may pose an obstacle to convening sentencing juries. Jackson, 390 U.S. at 580 (in the context of rejecting the concept of a sentencing jury, noting "[i]t is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality."). Unlike *Booker* and *Fanfan*, this case specifically raises the issue of remedy and therefore is the perfect vehicle for this Court to provide much needed guidance to the lower courts.

7. Petitioner's Sentence Presents An Additional Fifth Amendment Issue

All nine Justices in *Blakely* recognized that an enhancement may so disproportionately increase a sentence that the disputed sentencing factor become "a tail which wags the dog of the substantive offense," in violation of constitutional Due Process. 124 S. Ct. at 2560 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)); *Blakely*, at *8 n.13 (majority opinion); *id.*, at *28 (Breyer J., dissenting). Here Petitioner received a "life" sentence under the Guidelines for "terrorism" but the maximum penalty under the statute that is the basis for the conviction (18 U.S.C. §

2339B) is 15 years, the validity of the Guidelines under the Fifth Amendment is legitimately before this Court. Thus, this case presents the Court with the issue of whether a sentence imposed under the Guidelines is so disproportionate to the sentence for the underlying statutory offense that a defendant's Due Process rights under the Fifth Amendment are violated.

8. The Exceptional Circumstances Of This Case Warrant Granting Certiorari Before Judgment

Admittedly, the grant of a petition for writ of certiorari before judgment in a case pending in a court of appeals is rare. See *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976). This Court grants certiorari in such cases "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11.

In the first instance, the strict standard of Sup. Ct. R. 11 should not apply to Petitioner because for all intents and purposes, the Fourth Circuit has entered judgment in this case. After two rounds of briefing and two rounds of oral argument - one before a three-judge panel and one before the *en banc* court - the Fourth Circuit published and filed an order affirming the judgment entered by the district court and expressly holding that "*Blakely v. Washington* ... does not operate to invalidate Hammoud's sentence under the Federal Sentencing Guidelines." App., *infra*, 1. Moreover, the Fourth Circuit used the order to direct district courts within the Circuit to continue sentencing defendants pursuant to the Guidelines. *Id.* Granting certiorari in this procedural posture represents only a minor deviation from normal appellate practice.

Even if the strict standard of Sup. Ct. R. 11 applies, this case satisfies that standard. This case presents exceptionally

important legal questions related to the constitutionality of the federal sentencing scheme. The Court recognized the importance of some of these questions by granting certiorari this week in *Booker* and *Fanfan* -- even though the latter had not proceeded to judgment in the courts of appeals. The similarity between some of the questions presented by this case and the questions presented by *Booker* and *Fanfan* does not preclude a grant of certiorari before judgment because, as outlined above, this case is different from *Booker* and *Fanfan* in constitutionally significant ways. This Court granted certiorari before judgment in *Gratz v. Bollinger*, 539 U.S. 244 (2003) because it involved an affirmative action policy with important differences from the program at issue in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and therefore allowed the Court an opportunity to address the constitutionality of race in university admissions in a wider range of circumstances. Similarly, this Court should grant certiorari in this case to address *Blakely*'s impact in a wider range of circumstances.

CONCLUSION

This case is an ideal companion to *Booker* and *Fanfan*. It presents a wide range of *Blakely* issues in a non-drug context and has the additional advantage of presenting a disproportionality issue under the Fifth Amendment. For the foregoing reasons, Petitioner requests that this Petition for a Writ of Certiorari be granted and that this case be ordered briefed and heard by the Court on the same schedule as *Booker* and *Fanfan*.

This 6th day of August, 2004.

Respectfully submitted,

/s/James P. McLoughlin, Jr.
Of Counsel

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APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-4253

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MOHAMAD YOUSSEF HAMMOUD,
a/k/a Ali Albousaleh,
a/k/a Ali Abousaleh,

Defendant - Appellant,

CENTER FOR CONSTITUTIONAL RIGHTS; NATIONAL COALITION TO PROTECT POLITICAL FREEDOM; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; NATIONAL LAWYERS GUILD,

Amici Supporting Appellant.

ORDER

[Entered: August 2, 2004]

After oral argument was heard by a panel of judges, a majority of the judges in active service voted to hear this appeal en banc. The en banc court heard argument on the matter on August 2, 2004.

According to the vote of a majority of the en banc court constituted to hear this appeal, we affirm the judgment and hold that Blakely v. Washington, 124 S. Ct. 2531 (2004) does not operate to invalidate Hammoud's sentence under the federal Sentencing Guidelines. Therefore, district courts within the Fourth Circuit are hereby instructed to continue sentencing defendants in accordance with the guidelines, as was the practice before Blakely. In the interest of judicial economy, however, and pending a definitive ruling by the Supreme Court, we recommend that district courts within the Fourth Circuit also announce, at the time of sentencing, a sentence pursuant to 18 U.S.C.A. § 3553(a) (West 2000 & Supp. 2004), treating the guidelines as advisory only.

Majority and dissenting opinions will follow in due course.

Entered at the direction of Chief Judge Wilkins, with the concurrence of the court.

For the Court,

/s/ Patricia S. Conner
Clerk

United States District Court
For The Western District of North Carolina

UNITED STATES OF AMERICA

V.

MOHAMMAD YOUSSEF HAMMOUD
aka Ali A.A. Abousaleh
aka Ali A.A. Albousaleh

Stanley Cohen
Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 3:00cr147-1Mu
[Entered: March 18, 2003]

THE DEFENDANT:

___ Pleaded guilty to count(s).

___

P

leaded nolo contendere to count(s) which was accepted by the court.

_X_ was found guilty on count(s) 1ss, 2ss, 35ss, 36ss, 37ss, 41ss, 43ss, 49ss, 53sss, 54sss, 55sss, 71sss, 72sss & 78sss, after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
8:1325(c)	Marriage to Evade a Provision of the	9/12/97	1ss

	Immigration Laws		
18:1546(a)	False Statements to Immigration and Naturalization Services	7/5/00	2ss
18:2342 & 18:371	Conspiracy to Ship, Transport, Receive, Possess, Sell, Distribute and Purchase Contraband Cigarettes	7/00	35ss
18:1956(h)	Conspiracy to Commit Money Laundering	7/21/00	36ss
18:2342 & 18:2	Ship, Transport, Receive, Possess, Sell, Distribute and Purchase Contraband Cigarettes and Evade State Taxes, and Aiding and Abetting the Same	2/2/97	37ss
18:2342 & 18:2	Ship, Transport, Receive, Possess, Sell, Distribute and Purchase Contraband Cigarettes and Evade State Taxes, and Aiding and Abetting the Same	10/10/97	41ss
18:1956(a)(1) & 18:2	Money Laundering, and Aiding and Abetting the Same	8/28/97	43ss
18:1956(a)(1)	Money Laundering,	6/3/97	49ss

& 18:2	and Aiding and Abetting the Same		
18:1029(b)(2)	Conspiracy to Unlawfully Use Counterfeit Devices and Use of Unauthorized Access Devices	5/8/98	53sss
18:1029(a)(1) & 18:2	Unlawful Use of Counterfeit Access Device, and Aiding and Abetting the Same	5/8/98	54sss
18:1029(a)(1) & 18:2	Use of Unauthorized Access Devices, and Aiding and Abetting the Same	5/8/98	55sss
18:1962(d)	Racketeering	7/21/00	71sss
18:2339B	Conspiracy to Provide Material Support or Resources to a Designated Terrorist Organization	7/20/00	72sss
18:2339B	Providing or Attempting to Provide Material Support or Resources to a Designated Foreign Terrorist Organization	9/24/99	78sss

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984

___ The defendant has been found not guilty on count(s).

_X_ Count(s) 1, 1s, 2, 2s, 35, 35s, 36, 36s, 37s, 41s, 43s, 49s, 50s-52s, 50ss-52ss, 53s, 54s, 55s, 61sss, 61s-67s, 71s (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 237-75-3540
Defendant's Date of Birth: 9/25/73
Defendant's USM No.: 16449-058

Defendant's Mailing Address:
5425 Donnefield Drive
Charlotte, NC 28227

Date of Imposition of Sentence: 2/28/03

_____
Signature of Judicial Officer

Graham C. Mullen
Chief Judge, United States District Court

Date: _____

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Counts 36ss, 43ss, 49ss & 71sss: TWO HUNDRED FORTY (240) MONTHS each count to run consecutively with each other; Counts 2ss, 54sss, 55sss, 72sss & 78sss: ONE HUNDRED TWENTY (120) MONTHS each count to run consecutively to each other and with all other counts; Counts 1ss, 35ss, 37ss, 41ss & 53sss: SIXTY (60) MONTHS each count to run consecutively with each other and with all other counts, for a total of ONE THOUSAND EIGHT HUNDRED SIXTY (1860) MONTHS.

_X_ The Court makes the following recommendations to the Bureau of Prisons:

That the defendant participate in the Inmate Financial Responsibility Program to pay his assessment.

Forfeiture is ordered in accordance with the first preliminary order filed 2/11/03.

_X_ The defendant is remanded to the custody of United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district:

___ At _____ On ___.
___ As notified by the United States Marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

__ Before 2 pm on
__ As notified by the United States Marshal.
__ As notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ To _____

At _____, with a certified copy of this Judgment.

United States Marshal

By

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Counts 1ss, 2ss, 35ss, 36ss, 37ss, 41ss, 43ss, 49ss, 53sss, 54sss, 71sss, 72sss & 78sss: THREE (3) YEARS each count to run concurrently with each other.

__ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state or local crime.

2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.

3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the court.

4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.

5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.

6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.

7. The defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she

is released within 72 hours of release from custody of the Bureau of Prisons.

9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

10. The defendant shall support his or her dependents and meet other family responsibilities.

11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.

12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.

13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.

14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively.

15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

17. The defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant, and failure to submit to such a search may be grounds for revocation of probation or supervised release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searched pursuant to this condition.

18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.

19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.

20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to

make such notification and to confirm the defendant's compliance with such notification requirement.

22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.

ADDITIONAL CONDITIONS:

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$1,400.00	$0.00	$0.00

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

_X_ The interest requirement is waived.

___ The interest requirement is modified as follows.

COURT APPOINTED COUNSEL FEES

___ The defendant shall pay court appointed counsel fees.

___ The defendant shall pay $_____ Towards court appointed fees.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A _X_ payable immediately; or

B ___ $ immediately, balance due (in accordance with C or D); or

C ___ No later than; or

D _X_ through the Inmate Financial Responsibility Program. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

___ The defendant shall pay the cost of prosecution.

___ The defendant shall pay the following court costs.

___ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be sue during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA

-against

MOHAMAD YOUSSEF HAMMOUD
Defendant

NOTICE OF APPEAL
Docket No. 3:00-cr-147
[Entered: March 10, 2003]

Notice is hereby given that Mohamad Hammoud, defendant in the above named case hereby appeals to the United States Court of Appeals for the Fourth Circuit from the judgment of conviction and the final order entered after sentencing thereon in this action on the 28th day of February, 2003.

/s/ Mohamad Hammoud
Mohamad Hammoud

/s/ Stanley L. Cohen
Stanley L. Cohen, Esq.
119 Avenue D
New York, New York 10009
(212) 979-7572

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA
Plaintiff,

vs.

MOHAMAD YOUSSEF HAMMOUD
Defendant.

3:00CR147
FEBRUARY 28, 2003

[Entered: February 28, 2003]

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE GRAHAM C. MULLEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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MOHAMAD Y. HAMMOUD

STANLEY L. COHEN, ESQ.
119 Avenue D
Third Floor
New York, New York 10009

Proceedings reported and transcript produced by:

JOY KELLY, RPR
U. S. Official Court Reporter
(704) 375-7505

(Court called to order at 10:00 a.m. and defendant present in courtroom.)

THE COURT: All right. Good morning, counselor. Are we ready to proceed?

MR. COHEN: Good morning, Your Honor. Yes, we are, for the defense.

THE COURT: All right. This matter is before the Court for sentencing. Mr. Mohamad Youssef Hammoud, having been found guilty after a trial by jury, the jury verdict sheet entered on the 21st day of June of 2002.

There are -- there's no reason to worry about factual bases, et cetera, since this is the result of a jury trial. There are numerous objections from the defense. Do you wish to be heard on those, Mr. Cohen?

MR. COHEN: Your Honor, thank you. Just very briefly, and I think it's in the light of I had a discussion with the government last night about whether -- what, if anything, they intended to introduce before the Court today

with regard to evidence with regard to response to our arguments, and the government indicated it did not. And, quite frankly, we do not plan on introducing any evidence or seeking any new findings of fact by the Court.

I would just like to speak briefly about the submissions which we provided with regard to our objections, and we'll stand on all fours with those submissions, except I'd like to expand or clarify --

THE COURT: Is it relatively fair for me to conclude that the bulk of your objections seem to center around Apprendi issues?

MR. COHEN: Apprendi plus, with the material support issue that I would suggest that there's that second prong which was not satisfied. Essentially it's Apprendi plus that issue, yes, Judge.

THE COURT: All right, sir. Then if you would, you may proceed.

MR. COHEN: Thank you, Judge.

We're not going to retry the case obviously. I read the transcript, have taken a look at the voluminous discovery, had a chance to speak with the defendant on more than enough occasions to reach concern conclusions.

I'm not going do reargue Apprendi. I think it's throughout our papers. I think, Judge, this is not a case where the stacking concept applies at all. I think in brief that Apprendi stands for the proposition that where a sentence is driven by the amount in a particular case, that that's where it applies whether it's a drug case, whether it's a white collar fraud case, whether it's a tax case, and I think that applies here.

I think that, in essence, while the government has certainly proved beyond a reasonable doubt what was required by the statute, the minimum, and while the instructions speak to that, the upward, the additional sentence, the additional time was not satisfied, but that's Apprendi and Your Honor will make a ruling as a matter of law.

The Probation Department goes on to talk about how the defendant -- and correctly so, and I think we made a typographical error in our submission -- is entitled to the built of the 2002 Guidelines. But yet we would respectfully suggest they give with one hand and take with two because they don't then give him the benefit of 2002 Guidelines.

THE COURT: Where?

MR. COHEN: I'm sorry, Judge?

THE COURT: I say where is that?

MR. COHEN: Well, I think that under the Guideline Section 2M5.3, with a base level of six with no enhancement, is what really applies to this particular case, even though I'll give with one and take with two, because I suggest even in that light it's outside the heartland of that particular subdivision.

At the end of day probation applies 3A1.4, and with it the 12-point increase and the escalator from a Career Criminal History I, all the way up to VI, which is a life sentence. Everyone agrees to that.

And I would suggest that taking a look at the legislative intent, taking a look at the 2002 Guidelines, and I would urge the Court to consider obviously the 2002 Guidelines post 9/11 can certainly not be described as being enacted to

given the benefit or to improve the rights or to expand benefits for an accused. If anything, all the legislation which has come down in the area of alleged terrorism has made it more restrictive and more difficult, has chosen to penalize defendants or arguably fall within the rubric of such misconduct even more harshly than before.

But yet 2M5.3 as compared to 3A1.4 is very different in that under 2M5.3, if he does fall within the heartland, it's a base level 26, a Career Criminal History of I, I believe would score out at 155 to 188 months, which is a significant sentence for anyone, let alone for the conduct which was established or which the jury accepted in this particular case.

With regard, going back to the Probation Department's suggestion that 3A1.4 applies, the second prong, it seems to me, and I've looked at and looked at it then looked at it, and I may have missed it and we've looked at the history, very clearly talks about that in addition to the conviction, there has to be proof that there was specific intent to, quote, "influence, intimidate or coerce government" -- I'm leaving out the rest of the sentences --in order to trigger the elevator, the escalator clause. That is to say to take it from what would perhaps be a 15-year sentence or an 18-year sentence, to escalate it all the way up to a 43, and from a one to six and mandate life.

I would suggest that without that second prong, even if you apply the section which the probation report speaks of, we still end up in the area of 155 to 188 months.

I'm not going to speak about the obstruction issue, Judge. The Court -- I was not witness to this trial. Your Honor sat through this trial. You'll make whatever decisions with regard to --

THE COURT: Well, I have a problem conceptually with that whole process of a defendant who takes the stand and then gets hit with a two-point -- I think your cases are correct, that I have to find specific elements of perjury after a fact-finding hearing, and ultimately, I don't think it makes any difference in the sentence. So I'm going to allow your objection on the two-point enhancement unless you have stuff that I can pinpoint and go down -- I don't think it makes any difference in the sentence.

MR. BELL: Well, as long as everything holds up at the circuit it wouldn't. If there was something that the Court finds walking through the objections to the PSR that the circuit disagreed with, it could come to matter.

You're right, if everything holds up and it's an offense level 46 reduced to 43, it won't make any difference.

THE COURT: The cleanest trial I've ever done in the whole time I've been doing this.

MR. BELL: I agree with you and hope we're both right. And I do have some specific suggestions of things that were clearly perjurious --

THE COURT: Let's go back, then, and we'll argue that specifically, and let's let Mr. Cohen finish up what he has to say on the legal issue.

MR. COHEN: Judge, with regard to the nature of the sophisticated operation, again I'm going to rest on our arguments in the papers.

I think that it's no more sophisticated, no less sophisticated than any substantive offense which he was convicted of as part and parcel of it. But Your Honor will make a decision as a matter of law on that and hope springs

eternal. And we'll see where we end up on that particular issue.

With regard to the leadership role, I'm going to again rest on the arguments. I'm not going to belabor that particular point.

I would like to close out very briefly, Judge, and then obviously my client wishes to address the Court, with my view of my client as a young man. My view of the case.

I have been trying cases for 20 years all over the United States and done work in other venues, and sometimes you become so insinuated into your own self-fulfilling prophecy, sometimes you become so locked into what you believe it says or it doesn't say, it tends to admittedly distort the picture.

The advantage I have in this particular case is other than reading about this cryptically in the news from clippings in New York over the last year or year and a half, I didn't know anything about the case.

So I sat down and we had a chance, along with Mr. Brown assisting me in the Fourth Circuit, to read the transcript several times, to look at the discovery, to talk to the defendant at length, to talk to his family, to travel to Beirut, Lebanon, where I was approximately, I don't know, a month or six weeks ago to meet with his family, to meet with other persons that might have or may yet be involved in terms of helpful in the investigation of this matter.

I also bring to the table the fact that obviously this Court has before it one defendant and one case. But I have represented many, many cases involving Muslim activists where there have been some insinuations of terrorism or connected terrorism throughout the United States. So I have

had an opportunity to spend the better part of a decade researching, writing and litigating issues of Hizballah, Hamas and organizations both within the United States and without the United States. And I say that only because coming in after the fact has allowed me to take a sort of a -- I think -- well, objective is also self-serving -- but a different look. Not as the trial attorney who tried the case, although reasonable minds can disagree as trial attorneys as to how it should have been tried or should not, and I think I disagree with some of the strategy. But that's not what this is about right now. But in terms of who the young man is, who Mohamad Hammoud is and what the case is about.

As I said, I visited Lebanon. I sat with his infirmed elder mother -- older mother, elderly mother -- a bunch of family members in a small hotel in downtown Beirut, who spent the better part of three or four hours, I think, on three different sessions talking essentially about Mr. Hammoud, his upbringing, his youth, whether he was political, whether he's not political, whether he showed any signs of political interest or involvement while he was a young man in Beirut, whether they have seen any indication of that in the years since he's come to the United States.

I learned -- now, he grew up in a very difficult time, in a difficult place that was all at once torn, not just between a horrible civil war where hundreds of thousands of persons lost their lives and the entire country was torn asunder, but which was essentially occupied for more than 20 years.

THE COURT: It still is.

MR. COHEN: It still is. And I bring that up -- maybe by different occupation forces. But it's just been a process of occupied, occupied, occupation, which informed and infirmed the upbringing, the youth of the defendant in a

way that I think to some degree leads us to where we are today.

I have found absolutely nothing in my investigation, and obviously the government has accessed the information and intelligence status, some which may have played out in the court and some which did not, that leads me to conclude on all fours that Mr. Hammoud is an individual that is not in any way, shape or form connected to Hizballah. Is he someone who grew up in a time and a place where his sensitivities, his feelings, his commitment to millions of still impoverished people in Lebanon was infirmed? Absolutely. Did he grow up with other persons in a time where they later went on to occupy positions in an organization called Hizballah, which some people call terrorists and other people call The Army of Lebanon. I'm not here to try to convince Your Honor one way or another.

I've looked and looked and I've said to myself, okay -- and cigarettes are cigarettes, Judge. He's a cigarette smuggler and not good at that. Not accomplished at that. I don't deny that. The evidence shows that. The guidelines are appropriate, although I disagree with the level based on tax loss and the amount.

What the case really comes down to, I respectfully suggest to Your Honor, is whether this young man is going to spend life in jail or maybe 15 or 18 years, or somewhere around there, based upon this alleged connection, this incident -- this one, it seems to me, incident in connection with the money transaction. That's what it comes down to, Judge. Everything else is -- for two years, three years, five years, seven years we're dealing with someone of his age and his background -- that's, as we say, the whole show.

And I would respectfully suggest that this is not a case where this young man should get a life sentence. I don't

believe the Guidelines that score out and permit the 155 to 188 months are necessarily appropriate, although if Your Honor disagrees I'd gladly take it. I'd argue differently on appeal to the Fourth Circuit. At the low end it's more than enough.

What we have here, and as I look at the legislative history and I think about proportionality, the country lived through some horrible event in September 11th and there's horrible events continuing on. Congress has spoken. Congress has looked at the issue of terrorism and alleged terrorism and it seems to me under 2002 the amendments sort of didn't replace what was on the books before but certainly took a broad sweep and a broad brush and established a process of proportionality which says if a individual is convicted of certain crimes as opposed to certain other crimes, this sentence is appropriate as opposed to another sentence.

I would suggest that in the case where -- while the government -- apparently, and again I haven't had a lot of discussions with the government, I admit it, the case --while the government has alleged that there was a large amount of money, and I don't know exactly how much money and I don't know how much -- the jury didn't decide how much money was made or sold or benefitted, was raised over an extended period of time. And the government would suggest to the Court that it somehow found its way into the coffers of Hizballah. There's no proof to support that, Judge. Zero. None.

What we have, I suggest respectfully, is a singular insular transaction, I believe, involving some $3,500, in which I find it interesting the evidence seems to support that the person who received it was -- we can debate whether he was a propaganda person with Hizballah, whether he was with the political wing, whether he was -- I

don't suggest the military wing -- that could be debated as well. But he then gives essentially a receipt thanking the defendant more or less for the money that's going to be used for the people.

I think that's what it comes down to. And the government can say all day long there's millions of dollars involved here and there's a long paper trail. Lord knows, the government has the ability to establish a paper trail. They've proven it since September 11 in a lot of cases and they didn't prove it here.

And in that light, Judge, I would suggest there's two aims or two arms here. The Sentencing Guidelines were, I think, a mistake to begin with. I was certainly willing to defer, and I did for may years, to the wisdom and experience of the Court to take a look at a case, to take a look at the facts and to impose an appropriate sentence.

THE COURT: I couldn't agree with you more. I think probably even the prosecutor would share that, but nevertheless we have what we've got.

MR. COHEN: We have what we have. However, there are -- notwithstanding the Guidelines, and thank God, Congress at the end of the day said, but, of course, the Court has the ultimate say, power and discretion, although Your Honor knows better than I, you've got to lay the foundation so that the Fourth Circuit or the Second Circuit or the Ninth Circuit doesn't send sit back six times.

But ultimately the Guidelines were enacted to essentially introduce the concept of uniformity, of proportionality. And in theory they were introduced to balance the individual's background and the crimes and circumstances along with similarly situated individuals.

Now, I realize this case is sui generis in terms of -- since 9/11. In fact, it's pretty much sui generis in terms of most other cases that involve alleged cigarette smuggling or tax fraud, so there's not a lot to compare it to in terms of the whole proportionality analysis. But there is a lot else that's out there that it can be compared to.

There have been cases both before September 11th and since September 11th in which you have individuals who have been charged with overt acts that completely overshadow anything attributed to this young man, that have been charged with acts of violence that completely overshadow possession of weapons and conspiracies, use of force, and a whole process that is so far at the other end of the scale as compared to this young man, that in the spirit of the Guidelines, and in the spirit of proportionality, and in the spirit of mercy, Your Honor -- I'll speak about that a bit and I'm not going to preach to the Court. When it comes to that issue, Your Honor's reputation as a just jurist is well known.

I really don't think this is a case which calls for life. I don't think it's a case which in the spirit of the Guidelines calls for life. I think a life sentence would be out of the heartland of this particular statute, whether it's the old application or the new application.

I'd be the first -- I'd love to stand before you, Judge, and say, Judge, it's about cigarette smuggling and nothing else. I think an argument could be made. The jury rejected that. They did accept that, cigarette smuggling plus. And again I'm focused on that "plus" issue.

And I think there's a wealth of discretion for this Court to compute the Guidelines, to use your inherent authority, to take a look at this young man, to compare it to what others have done or not done in coming with a sentence

below what the Probation Department says the Court should or can or, in fact, they suggest must -- I don't except the "must" because the Court always has the inherent authority to carve out based upon facts circumstances and the law an appropriate sentence.

I would respectfully suggest to the Court, keeping in mind our objections to the obstruction and to the supervisory role and to the sophisticated nature of the operation, and keeping in mind the fact that we don't believe the boost in terms of the extra points for the tax loss was met by the burden -- was met by the government, rather, in the Apprendi issue, keeping in mind all of that, I suggest to the Court at worst blush we should be dealing with a Guideline range of 155 to 180 months.

THE COURT: All right, sir. I want to make sure you have on the record -- because my understanding of the habeas areas is that, indeed, you may make a proportionality argument where there is a life sentence without parole. I want to make sure that I understand that you are, in fact, asserting that as a constitutional issue of significance at this point in this proceeding.

MR. COHEN: I am, Your Honor.

THE COURT: All right, sir.

All right, Mr. Bell. And we will give Mr. Hammoud an opportunity to address the Court.

MR. COHEN: Thank you, Judge.

THE COURT: I would like to hear from you with reference to these arguments.

MR. BELL: Your Honor, then I'll address the 3A1.4 and perjury issues.

THE COURT: I think that would be appropriate.

MR. BELL: Apprendi has been disposed of, I think, pretty well by the Probation Office, as have the other objections.

3A1.4, Your Honor, we filed a sentencing memorandum earlier in the week and that guideline is applicable if two things are proven: That is, has this felony come in connection with a federal crime of terrorism, which is defined by being --

THE COURT: Let me just interrupt you right here. Now, you were referring to 2M what?

MR. BELL: 3 -- 5.3 Your Honor.

MR. COHEN: Yes, Judge. 2M5.3.

MR. BELL: That's a new guideline specifically for 2339B, which did not exist prior to this latest edition.

The reason that's not the guideline that ought to be applied in this case is simply that the base offense level under that guideline is 26. Oddly enough, the base offense level under the money laundering guidelines for this is a 28, as it worked out, so that's the most serious charge. So that the calculations done by the Probation Department continue to be the correct ones to apply to Mr. Hammoud.

So even though the PSR didn't reference that section, it wouldn't have made -- it doesn't make any difference in the sentence.

THE COURT: Okay. I'm sorry I got you off-track. If you want to start over with the 3A1.4.

MR. BELL: 3A1.4 provides that if this felony -- the felony conviction is in connection with a federal crime of terrorism, then the Guideline applies.

There are two things to be established in determining whether it's a federal crime of terrorism.

First, that it be one of several statutes that was violated, 2339B being one of them. So the only prong that is worthy of discussion is whether the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.

And, Your Honor, the distinction I draw factually as to why that guideline should apply to Mr. Hammoud but not every defendant convicted of 2339B is that it would be a violation of 2339B for an individual to give money to Hizballah not knowing what Hizballah does; that is, kill people and blow things up, among others things. So you could be guilty of 23393 and not have that guideline applicable to you.

THE COURT: Even if you made a donation strictly for charitable purposes.

MR. BELL: And that was my second example.

If somebody knows -- they give money to Hizballah, but they really are thinking and intending to give that money to the widows and orphans; that is, this is what I thought Hizballah did. They know who Hizballah are, they know they are an organization, but that's not their motivation. It's

sort of a motivational element. You're giving material support and resources to Hizballah. Why?

So in this sentencing memorandum we filed we recounted for the Court some of the evidence of Mr. Hammoud's specific knowledge of the violent conduct of Hizballah with respect to the governments of United States and Israel. That his direct connection to Hizballah is Mr. Harake, who there's testimony is the military commander for the Beirut suburbs, as opposed to the orphanage director. And I have -- if the Court wants to hear more, I have another dozen examples of videotapes and FISA intercepts where it's the military aspect, the violent aspect, the retaliatory aspect of Hizballah that was of concern to Mr. Hammoud.

So when he's giving money, as the jury found, to Hizballah, and specifically with reference to Count Seventy-Eight, the money to Harake, who is the military guy, that's what distinguishes him and the applicability of this guideline from others who could be convicted of the statute without the same motivations. And for those reasons the guideline does apply to Mr. Hammoud.

Now, with respect to the perjury counts, I do have -- I hear what Your Honor is saying. If the Court sustains the PSR, it's an offense level 46, these two levels don't matter. And I hope you and I are right that the circuit isn't going to take issue with any of this. But I do have some specific suggestions as to where Mr. Hammoud's testimony was clearly perjurious and calculated to deceive the jury.

Perhaps the easiest one is on page 1807 of the transcript where on --

Ms. Rubio wants me to add to my last argument, Your Honor, one of the things that we put into evidence was the

interview of General Secretary Nazarallah of Hizballah, where he says, "The money comes in and gets comingle and I decide where it goes," which is a point worth making and I didn't.

On page 1807 of the transcript, on cross examination Mr. Hammoud was asked specifically about the $3,500 that Said Harb testified was taken by him from Mr. Hammoud and destined for Harake. And Mr. Hammoud's answer was, "Well, not only this 35, I swear I never, never, never in my life, since '92, I gave Said either penny to my parents, not to Sheikh Abbas, ever to my parents, I never gave a dollar to my parents since '92 until this time. I never sent Said. He's the only person I never sent to Lebanon."

Well, the jury clearly found different. So that's the easiest, most straightforward example of his perjury. I have about a dozen more in here if the Court wants me to go on.

The case that Mr. Cohen cited is the guide for the Court, it's United States vs. Jones, 2002 case, where the Court needs to find that the defendant gave false testimony concerning a material matter with the willful intent to deceive rather than a mistake. That's the easiest, most straight forward. I have another dozen if Your Honor wants to entertain those suggestions as well.

THE COURT: Well, I think here's the time to make the record.

MR. BELL: All right. On page -- beginning on page 1870, Mr. Hammoud testified contrary to the testimony of F.B.I. Special Agent Khoury, who in telling the jury about Mr. Hammoud's post-arrest debriefing, quoted him as saying he regularly sent eight or nine hundred dollars by couriers to Lebanon. Mr. Hammoud's testimony is that

Mr. Khoury was wrong about that; that that only happened one time.

At page 1872, Mr. Hammoud testified in response to the question, "Did you send the money then to the charitable part of Hizballah?"

"Answer: No, I never sent anything has to do – I don't like to send basically to association or anything. I like to send it directly."

In that point he denied ever sending any money to even the charitable wing of Hizballah, which is obviously contrary to the jury's verdict in Counts 72 and 78.

On page 1877 Mr. Hammoud testified that he never sent money to The Resistance no matter what Abu Adam put in his letters to that effect.

On page 1887 Mr. Hammoud testified that Harake is in the propaganda wing, not the military. That's contrary to the testimony of Matthew Levitt, the Court-certified expert witness and Said Harb.

One thing I did – I should have mentioned this also during the 3A1.4 argument, again to show Mr. Hommoud's political motivations, essentially, which is necessary for that.

On page 1884, when he's being asked about some statements by General Secretary Nasserallah, his anti-American statements, in this testimony Mr. Hammoud says, "But those are just things people say hoping that the U. S. will change its foreign policy." So again emphasizing he knows what Hizballah is doing is gearing its acts towards affecting, retaliating, intimidating U. S. Government actions.

That should do it, Your Honor.

THE COURT: All right.

MR. COHEN: Judge, may I just very briefly respond to two points raised by the government?

THE COURT: You may.

MR. COHEN: Judge, first of all, the government, it seems to me, is arguing two separate issues. One as to the second components of the material supports section and the other has to do with perjury.

The first is that somehow the government is arguing that knowledge can -- without more, or knowledge even with some more, which is visibly absent here, somehow end up to specific intent.

The second element that is required under the section of 3A1.4 is not a statute that talks about knowledge, so that even if the government is correct that the defendant has certain knowledge about certain things that persons involved with Hizballah allegedly do, that does not establish that it was his intent by making a donation to carry out that particular component or intent or that aim as opposed to -- and the record is very clear, even the government's own expert and witnesses talked about how Hizballah is a multifaceted organization. It has an army component which is essentially the Army of Lebanon. It has a charitable component, it has a school component.

THE COURT: It's the Army of Shi'a Lebanon. Is that not correct?

MR. COHEN: Well, Judge, there's a government army which is essentially about a thousand soldiers that are in Beirut and then the army -- literally the army --

THE COURT: I've knocked you off track. Go back to what you were talking about.

MR. COHEN: Oh. So knowledge does not mean specific intent. They have to prove beyond a reasonable doubt -- they had to prove beyond a reasonable doubt for the second component of that elevator, escalator clause to work that that was his intent, something which they didn't do, something which wasn't asked in a special verdict sheet of the jury, something which wasn't argued to the jury. It needs something which wasn't included in the instructions. So we're now here after a trial, after a jury has made findings of fact, certainly as to one of the two components, but it's not disjunctive, it's "and", now arguing, well, the jury must have meant the second component as well because look at what the record shows.

The jury never said that. They never decided that question. It was never proven beyond a reasonable doubt. Never raised. Afterwards the government is now saying, well, of course that's what it meant. He knew this, Judge, so what it means, because of his knowledge this was his intent. That's something that never went to the jury. And that really is on all fours, an Apprendi issue in that context and it's an element.

Now, with regard to the perjury, Judge, they started out -- the fact that someone is found guilty after they have testified does not mean without more that they have committed perjury. And that's why as Your Honor pointed out in acknowledging the cases I cited, there has to be specific examples where someone -- where the elements of testimony or statements have been proven to be perjury. Being contrary doesn't establish, doesn't amount to perjury.

If we took for the premise the government raised several times a few moments ago that the jury rejected this, the jury

rejected this, the jury rejected this and found him guilty and thus he was lying, it does two things.

Number one, we don't know what the jury decided or why. We didn't Monday morning visit and say this is what they meant and why. They may have accepted certain things he did and rejected other things. They may have believed he was mistaken as a matter of memory, not as a matter of bad intent.

To embrace, as the government does or suggests with broad sweep, that a guilty verdict necessarily means perjury would, number one, fly in the face of the law, but more importantly it would deter clients, defendants from ever testifying. Because the defendant knows if I testify and I get convicted, I'm getting perjury.

THE COURT: Well, I don't want to go -- I don't want to say too much. The cases are rather difficult for me to reconcile. Nevertheless, I think I am prepared to go forward at this time.

MR. COHEN: Thank you.

THE COURT: First, I need to deal with your departure motion. And this shows the difficulty of out-of--town counsel.

However accomplished and articulate as you are, sir, there is a standing order in this Court that any suggestions for a downward departure have to be briefed and supply the Court with an analysis on the matter in the case of United States versus Joyce Higdon. That is not present here, and, therefore, the Court will in its discretion not depart. Now, let me deal with the other matters.

I will adopt the response of the Probation Office to the objections. And as to your suggestion that the Jones case must apply, it clearly does.

There is clear testimony from Mr. Hammoud that he never sent any money to Lebanon at all. And there's a clear receipt for money. So there is a clear -- there is a clear false statement and I would find that it is made with the intent to deceive.

The other matters that have been related by Mr. Bell are perhaps subject to your analysis and argument that mere disagreement doesn't constitute a false statement. However, the jury found otherwise and I think that I'm stuck with that. But at least as to that one where there's a clear-cut -- I think it's there and I find it was done with intent to deceive. I therefore find that this man is a level 46, Criminal History Category VI.

The sentencing protocol, if you will, is somewhat peculiar in this regard as calculated by the Probation Office. And at this time I think Mr. Hammoud may address the Court on his own behalf if he wishes to do so.

THE DEFENDANT: Thank you, Your Honor.

It's hard for someone to say something when the fate of his life is going to be decided in a few minutes.

I have been thinking about a lot what I was going to say, but it's hard for me to say what I want to say, especially I have a lot of things that are hurting me and I want to address in front of Your Justiceness. Perhaps one thing that could make it easy for me to say and talk and give me some courage, your well knowing justiceness. I hope you can be patient with me.

I want to the start with the most things that been bothering me.

Since June 21st, 2002, every day I wake up and I think about this issue, and I ask myself question: How was I convicted in the Canadian conspiracy? At least with the other charges I know somebody came and stand and said something, and then the jury believed them and they convicted me upon. But with the Canadian conspiracy, I still to now, I can't find any, ~~any~~ answer for it.

I went and I looked in the trial transcript thinking I might could find answer or something that I missed during the trial. I found one thing.

Mr. Bell said that Said is a middleman between Charlotte and Canada. So I went to look and see what Said has to say. When my lawyer asked Said if I know Mohamad Dbouk, he said I don't know him. And he said I don't know anyone in Canada.

Also when my brother's lawyer asked him, he said Said, is it part of conspiracy or you helped Dbouk because he's your best of friend? Said replied and said he helped him because he was his best of friend.

I still think why I was -- I mean those -- there was no evidence that I was -- I had anything to do with Canada. Beside, the record showed that I never been in Canada. I never called Canada. And in addition to all of that, during the Canada conspiracy, the most activity that was taking place at that time, I was in Lebanon, and when I came back I wasn't talking to Said.

Now Mr. Bell said, well, now Mohamad is saying that his relations severed with Said because Said is cooperating. I am sure Mr. Bell did not pay attention to Mr. Khoury's

testimony or to my statement. Otherwise he would have seen that. I said in my statement to Mr. Khoury in July 21, 2000, that I don't talk to Said since I came from Lebanon because of his involvement in the pornography and other dirty works. And Mr. Khoury testified to that as well.

So I still think what make the jury think and convict me in Canada -- Canadian conspiracy?

Perhaps because Mr. Bell asked me at least ten questions about Hizballah activity back in the '80s when I was between 10 and 14 years. Or maybe because he asked me what "Death to America" means at least ten times and then he repeated it again in his closing statement and that made the jury think what they thought.

And besides all of this, I was reading in "Newsweek" article, and they said most of those allegations, they were done by Hizbadallah (ph), and which is one of American ally in the era against Saddam. Also I told him, and -- in '80s when Hizballah was doing this, no one liked him. No one liked Hizballah. And I was one of those people who hated Hizballah. And I hated to find when he was leading Hizballah.

If we liked Hizballah, we like to think Hizballah, very humanitarian help and other things is -- The Resistance against the occupation, which is with accordance to the United Nations and the international law, and to the April 1996 Accord, which is the United States was one of its broker, and I'm sure the United States won't be broker for something illegal or terrorist.

As you now know, Hizballah -- and everybody knows now -- Hizballah is more toward politics. Since maybe nine years or so they became part of the parliament and they have all the legal issue people elect them.

And just last month, with the front, phoney meeting that contained at least 55 presidents and prime minister from all around the world, Nasserallah was present in this meeting and he was just one of those people. Chirac, the French president was there. The Canadian prime minister was there. Denmark's prime minister was there. There were a lot of country leaders.

Or maybe I was convicted because the expert said that Harake is a military commander and Said Harb said that as well. But I want to ask a question: If somebody came here and testified and he said he's an expert in Catholic religion and he said that the Pope John II's church here in Charlotte, would anyone believe him and would anyone think he's an expert? Well, saying that Mosque Zembinali (ph) in Bourj al-Barajneh is Fadlallah's mosque is just like saying John Paul II's church here in Charlotte.

I believe the expert completely relied on is statement on Said. And Said, himself, said that he doesn't know Harake by face. Who knows Harake by face? Samir Debk. He said I know Harake by face and he lives close to my parents' house. But what he said about them, he said I don't know what his position. All of I seen him solving problems and I don't think solving problems is considered a military commander.

Beside Mr. Bell said he has the videotape that on it Sheik Harake. Well, I don't remember this tape but I can assure you that if Harake on this tape, he's hosting for the celebration.

Your Honor, Sheikh Harake is not military commander. He's in the propaganda wing. And if you see that tape that -- if he's on the tape, you play it, you'll see him. He's hosting celebration. That's his job and that's what always I knew about him.

Or maybe I was convicted because they played a little portion of the tape that has anti-American slang. That I never paid attention to it.

When I called my brother I asked him, bring me this tape. I hear about the operation in the news. I tell him does it have a tape? Send it to me. He send it. I don't look carefully for what this tape contained or what --all I know, I look at the label of the tape. That's The Resistance of Operation blah, blah, blah and that's all.

Well, when the tapes was playing I saw it in the jury's face, everybody -- they were -- they were smiling and looking at me just as a human being. When they saw those tapes, completely they changed. They start looking at me like they hated me. They don't want me anymore. And I don't blame them. They love their country. And somebody here who is foreigner, committing crimes and now he hates them and wants to kill them. I'm sure anyone would be standing there going to feel obligated to not only send this guy to life, send him to hell.

And, of course, when I explained to them what it meant, at least to me, or what it means when in Lebanon people said it, they don't believe me. Especially now after September 11th. This words means a lot. Not like maybe back before September 11th. If I had said that, maybe that, they believe it. But now they said they saw people who done it.

And people in general, they do not distinguish between Muslim bin Laden and Muslim real Muslim. They don't -- those people do not know that bin Laden hates us more than he hates anyone. They don't know bin Laden people killed thousands of Shi'as in Afghanistan. They don't know that bin Laden people killed hundreds in Uzbekistan all over.

Just one month ago, one even in Lebanon, he stayed in the middle of Beirut and he opened fire and he killed people. He said, "I am belong to bin Laden and I think Shi'ite is disbeliever and Christian are infidels." I have the article here. And they killed people and they left. That's bin Laden people. And I think now they think almost I'm just like bin Laden.

Or maybe because Said claimed that I had an envelope, even though he described my envelope that on it "for resistance," even though he described my Greenbriar apartment and then had said, no, the envelope was not labeled.

But, Your Honor, I had a jar. It was on my computer desk. I asked my lawyer about it a hundred times. Where this jar? If this jar was present, then everybody can know that Said is lying and Medhat is lying.

The jar, you know what has on it? It has "for poor, needed and orphan." It has also a saying, "Help who is in the land, the one who is in the heaven would help you." I have it on my computer desk. It was -- it was yellow strapped (ph) . I asked about it a hundred times. I never got it.

Then also I had a notebook. It written on it, "Don't open. Don't touch. Mohamad. Special." In this notebook I have all my financial issues that is special between me and my God. Every penny that I sent to donation for komas (ph), for everything, I have in that notebook. If I lend anyone money, I have it in this notebook. If I borrowed money from someone, I had this in my notebook.

And I had my well (ph) on it, inside this notebook. I found my well. And my well, they said they found it in this notebook. I asked my lawyer about it many times. I told

him this notebook, if I got it, I can convince them that I did not send what they are saying. Well, he said they don't have it. But how come they got my well and they were not able to find my notebook?

Besides, if I had this notebook, when I told the jury that I did not pay in 1996 and 1997 komas (ph) and Mr. Bell has the right to say, he said, well, he had money at that time. He was working in cigarettes. Yeah, I was working in cigarettes but I did not make money. And if I had this notebook I would prove that I did not pay money in '96 or '97. I was broke at this time. I was taking from my credit card. I was working cigarettes but I was getting help a lot.

Or maybe I was convicted because my lawyer did not prepare any of my witnesses and he did not call my main witness, Abu Adam, father-in-law, who was willing to come and testify and say what Abu Adam was. And he was as a teacher, English teacher, in Lebanon. And who can say that Abu Adam have never been in Lebanon before, in his life before he left in '95 or '96. And he can tell the jury what he thinks in thanking me for. He's the one who gave me the medications. He was the one who that give me the class. He always the one who I call him whenever somebody is leaving to Lebanon. I tell him you want to send something to Abu Adam? He tells me yeah. I come and I get all the stuff and they send it to Abu Adam. So he was able to clear a lot of things up. I did not get him. I don't know why.

Or maybe because I was not able to retain language specialist who can come and testify and tell the people that the word "jinhakna" is only one word and it has only one meaning. It means "our people." It does not mean "our guys." It does not mean "our group." It means "one." And at the same time, he can come and say -- explain how we are in Arabic, in general we speak in plural. I mean we speak a lot in plural. We don't speak in singular that much.

Especially respecting each other, all the time we speak as "we", while I am.

Or maybe because my lawyer refused to bring an expert who can testify who is Hizballah, and to tell the people someone who is like -- tell the jury someone who is like myself who talks in public about Hizballah and who has videotapes about Hizballah cannot be a Hizballah because Hizballah, everybody read about Hizballah. Hizballah very secret organization. Someone like me cannot be a Hizballah because if somebody thought about Hizballah, they can come and pick me up. I'm the first one, in the restaurant, always I speaking about Hizballah politics.

And also he can tell the jury that if you take money for poor it cannot go but to the poor. And if you take to the orphan and it cannot go but to the orphan. And if you are not the follower, if Humani (ph) and Kameniahe (ph), the school, your money cannot go to Nasserallah because Nasserallah is the representatives of Kamaniahe and Kemet (ph) school. He's not the representative of other schools.

Or is it because we were happy when Israel withdraw from our country after their illegal occupation for 22 years. Or we cannot be happy when something bad happened to the army that invaded our land, destroyed our house with their airplanes. Kills thousands of our innocent children and all the people, and they deprived us from all means of life.

Or we should not congratulate each other when two airplane, military airplane, destroyed or crashed while they coming to Lebanon to kidnap and kill people in violation of international law and all human law.

Or if it is a crime to watch videotapes for some military operations that had been done in Lebanon, in our land, and

in the defense for our land, and those operations, according to April Accord, it's a legal operation. United States was a broker on it too.

I am very certain if we had asked those questions to all the American who were under the Britain occupation they would have good answers. And if you had asked it to the French who were under the Nazi occupation, they would have good answer. If we had asked it to anyone who knows what it's like to be under the occupation and how you feel, they would give a good answer. And I am sure, Your Honor, I heard you were in the Navy and you went to protect your country, I'm sure you have also good answer for this.

Your Honor, the occupation left us with a lot of pain and lot of bad memory. But that does not mean we are violent people. We are not violent people. We like peace. And we appreciate peace maybe more than anyone because we always were without peace, we never had peace. So we love it and we appreciate it. But we don't try to do violence.

I had here one guy, he's the son of the agent who arrested me and tortured me. He's the one who when my mother was came -- came to visit me, he pushed me away and yelled in front of my mother at me while I was arrested. I saw him here in Charlotte. And he was agent as well. I never said a word for him that hurt his feeling. Even I never told him his father what his son had done to me. I know him. I think he does not know me but I know he was agent. And I never hurt his feeling, Your Honor.

Now, I want to talk about another thing that hurt me more all those charges. After all of this I get to be accused of killing and destroying the ambulance and escaping from jail. Your Honor, I want to ask a question.

THE COURT: Well, let me tell you that I have already disposed of that issue in your favor.

THE DEFENDANT: Okay. Well, now, Your Honor, after I revealed some of my pain, I want to say I'm sorry for not paying tax. I am sorry for not saying the truth in some forms. I try to cooperate with the government. It did not work out. So I can face some of what I did wrong.

I am sorry for not saying the truth to the INS because I wanted to stay here. I wanted to live in freedom and peace. I wanted to be just like all those people. I want my -- I don't want to go back to the poverty. Just like millions of people who come from all around the world, some of them die in the desert, some of them drown in the ocean just to come here so they can live in peace and freedom.

I just was one of those people who has a lot of a dream. I want my children. I was dreaming that my children one day would raise here and they would be able to buy what they need, they able to go to school and improve my parents' life and everything.

Your Honor, since I have been here in the United States, since I left I was 18 years old. I was away from my family. I was away from everyone. Everyone who loved me. I sacrificed a lot for my goal. Perhaps I went a little bit in the wrong way or I went in the wrong way to achieve my goals. And I admit to that. And I'm sorry for it. I'm sorry for you and I'm sorry for everybody to do that.

Since I been here I sacrifice. I missed - my oldest sister died. I did not go to say goodbye to her just because I want to stay here in this country. I do not want to lose my future. I don't want to destroy my future. And, of course, now I regret that.

After all my dreams that I dreamed, in July 21st, 2000, all those dreams destroyed when I lost everything. Now my only hope that -- my only hope that I still have on my mind and I pray for is that I can go back to Lebanon and see my mother before she die, since that's what she always pray. She always pray for me that she wants to die while we're all next to her. I don't know if her wish is ever going to be true.

Now, Your Honor, I ask you, please, if you believe in God, treat me accordingly. And you are the one --whenever I mentioned your name, everybody knows you by your justiceness. I have mentioned your name between Raleigh to Florida to Washington. Everybody tell me that I'm very fortunate to have you on my case.

I ask you, since you are very well known in your justiceness, just treat me like you treat most people. Don't treat me differently.

I thank you very much for your patience.

THE COURT: All right. Mr. Bell, do you have anything that you wish to say?

MR. BELL: Very briefly, Your Honor.

You know, the protestations of peace and innocence and naivety about Hizballah really ring empty when you think about the virtual library of Hizballah, anti-American, anti-Israel, vitriolic, violent condemnations.

Whether you recall the video about pledging to detonate themselves and shake the ground under our feet or the many incantations of "Death to America," that does not square with this poor man who was just wanting -- his explanation is, "I only wanted to see the part where we're at war with the Israelis in the south. I'm a man of peace. And

that stuff about death to American and explosive belts against Americans, I just don't believe in any of that."

If you -- even just a short look through Mr. Hammoud's life -- and, you know, I keep thinking about that videotape with his nephews being prompted and they're responding with "Hizballah. Hizballah." Beautiful little children, a couple years old, already being taught to raise their fist in the air and chant "Hizballah". Or the picture of Mohamad Hammoud himself in 1989 with the AK-47 raised, the picture of Ayatollah Khomeini behind him with the caption, "Mohamad Hammoud at the Hizballah Center." Or the pictures of him sitting around with his pictures of the Ayatollah Khomeini and General Secretary Nasserallah.

Or these pictures, Your Honor, which we didn't put into evidence at trial but I've marked them for Government's Exhibit Sl, 2 and 3 for sentencing purposes.

(Shows documents to defense counsel)

And I move them in, Your Honor, and offer them to the Court.

S3, with Mohamad Hammoud -- these were taken from his home, Your Honor, standing here in the Charlotte area with a rifle in his hands.

One and two with him playing tourist in Washington, D.C. in front of the Washington Monument, and with his codefendant, Mohamad Atef Darwiche in front of the White House.

Your Honor, these protestations of innocence, persecution, desire for peace do not square with the evidence, they do not square with the jury's verdict, and

they do not square with the library of violent material we took out of his house.

The sentence that the Court will impose as a result of its findings of the applicability of the guidelines is right and just.

THE COURT: Well, having determined that and adopting the findings of the Probation Office, the sentence falls out as a matter of law.

Madam Clerk, we found 46 and six. You'll have to -- I don't know how you put that on the J&C but it winds up a 43 and six because it exceeds the maximum level under the guidelines.

And because of the quirks of sentencing as explained in the Presentence Report, the Court has the following proposed sentence: On Counts 36, 43, 49 and 71, 240 months on each count consecutive. On Counts 2, 54, 55, 72 and 78 -- Madam Clerk here's your list -- 120 months each count consecutive to each other and all other counts. On Counts 1, 35, 37, 41 and 53, 60 months each count consecutive to each other and all others counts, for a total of 1,860 months incarceration. Three years supervised release. Each count standard conditions. Special assessment $1,400 due and payable through the Inmate Financial Responsibility Program. The Court finds that this man has no ability to pay a fine. There is no fine.

It is not the kind of sentence that I think anybody takes any kind of pleasure in, Mr. Cohen, and I do so because I believe it is required by law.

MR. BELL: Your Honor, if I might, just one question. Mr. Bradford asked me to ask the Court to state during its imposition of the judgment that the forfeiture is ordered in

accordance with the first preliminary order filed on February 11th of '03.

THE COURT: So ordered. If you'll make the language known to the clerk.

Mr. Hammoud, you have the right to appeal your conviction and you have the right to appeal the sentence of the Court.

If you are indigent, you may file a Certificate of Indigency in order that the Fourth Circuit will appoint someone for you. If you do appeal, you must do so in writing. Your appeal will have to be signed. You'll have to sign the Notice of Appeal. There is a limited period of time after the preparation of the judgment and commitment within which you must file your notice of appeal.

Mr. Cohen, are there any other issues that you wish to make sure are on the record?

MR. COHEN: Judge, only -- and it really is -- it's completely academic, I would object to the -- and the Court -- they are in -- I would object to the three photos which were introduced as part of the proceeding, but it's obviously -- it's an academic issue. Just so that it's on the record. In all other respects it's fine. I will be perfecting the appeal and filing the appropriate notice with the Court.

THE COURT: Have I adequately explained Rule 32 to this assembled group?

MR. COHEN: You have, Judge.

THE COURT: Very well. Is there anything further than ordering the imposition of the sentence as stated?

MR. BELL: No, Your Honor.

THE COURT: All right. Madam Clerk, the sentence is ordered imposed as stated.

MR. COHEN: Thank you, Judge.

THE COURT: Thank you, Mr. Cohen. It's been a pleasure to have you in our court.

MR. COHEN: Thank you for your courtesy, Your Honor.

(Hearing concluded at 11:11 a.m.)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

CERTIFICATE OF REPORTER

I, JOY KELLY, RPR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

JOY KELLY, RPR Date
U.S. Official Court Reporter

Federal Rules of Criminal Procedure 32

Rule 32. Use of Depositions in Court Proceedings

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United

States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition taken without leave of court pursuant to a notice under Rule 30 (a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and when an

action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Form of presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the

disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

8 U.S.C. § 1325

§ 1325. Improper entry by alien

(a) Improper time or place; avoidance of examinationor inspection; misrepresentation and concealment of facts. Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18, United States Code, or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, United States Code, or imprisoned not more than 2 years, or both.

(b) Civil penalty. Any alien who is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers shall be subject to a civil penalty of--

(1) at least $ 50 and not more than $ 250 for each such entry (or attempted entry); or

(2) twice the amount specified in paragraph (1) in the case of an alien who has been previously subject to a civil penalty under this subsection.

Civil penalties under this subsection are in addition to, and not in lieu of, any criminal or other civil penalties that may be imposed.

(c) Marriage fraud. Any individual who knowingly enters into a marriage for the purpose of evading any provision of

the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $ 250,000, or both.

(d) Immigration-related entrepreneurship fraud. Any individual who knowingly establishes a commercial enterprise for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, fined in accordance with title 18, United States Code, or both.

18 U.S.C. § 371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1546

§ 1546. Fraud and misuse of visas, permits, and other documents

(a) Whoever, knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United

States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact—

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

(b) Whoever uses—

(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,

(2) an identification document knowing (or having reason to know) that the document is false, or

(3) a false attestation,

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act [8 USCS § 1324a(b)], shall be fined under this title, imprisoned not more than 5 years, or both.

(c) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481). For purposes of this section, the term "State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

18 U.S.C. § 1956

§ 1956. Laundering of monetary instruments

(a)

(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A) (i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986 [26 USCS § 7201 or 7206]; or

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $ 500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place

outside the United States or to a place in the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $ 500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent--

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Penalties.

(1) In general. Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of--

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $ 10,000.

(2) Jurisdiction over foreign persons. For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the

foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and--

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets. A court described in paragraph (2) may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver.

(A) In general. A court described in paragraph (2) may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) Appointment and authority. A Federal Receiver described in subparagraph (A)--

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant--

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section--

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with

respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title ~~thereto~~ passes upon delivery;

(6) the term "financial institution" includes--

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1 of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means--

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31 [31 USCS §§ 5311 et seq.];

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving--

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978 [12 USCS § 3101(7)])[];

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving--

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774); or

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844 (f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate

communications), section 922(1) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), or section 2339A or 2339B (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled

Substances Act [21 USCS § 863] (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act [22 USCS § 2778(c)], section 11 (relating to violations) of the Export Administration Act of 1979 [50 USCS Appx. § 2410], section 206 (relating to penalties) of the International Emergency Economic Powers Act [50 USCS § 1705], section 16 (relating to offenses and punishment) of the Trading with the Enemy Act [50 USCS Appx § 16], any felony violation of section 15 of the Food Stamp Act of 1977 [7 USCS § 2024] (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $ 5,000, any violation of section 543(a)(1) of the Housing Act of 1949 [42 USCS § 1490s(a)(1)] (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938 [22 USCS §§ 611 et seq.], or any felony violation of the Foreign Corrupt Practices Act;

(E) Environmental Crimes. a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or

(F) any act or activity constituting an offense involving a Federal health care offense;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if--

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $ 10,000.

(g) Notice of conviction of financial institutions. If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue.

(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in--

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

18 U.S.C. § 2332b

§ 2332b. Acts of terrorism transcending national boundaries

(a) Prohibited acts.

(1) Offenses. Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)--

(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or

(B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States;

in violation of the laws of any State, or the United States, shall be punished as prescribed in subsection (c).

(2) Treatment of threats, attempts and conspiracies. Whoever threatens to commit an offense under paragraph (1), or attempts or conspires to do so, shall be punished under subsection (c).

(b) Jurisdictional bases.

(1) Circumstances. The circumstances referred to in subsection (a) are--

(A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;

(B) the offense obstructs, delays, or affects interstate or foreign commerce, or would have so obstructed, delayed, or affected interstate or foreign commerce if the offense had been consummated;

(C) the victim, or intended victim, is the United States Government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches, or of any department or agency, of the United States;

(D) the structure, conveyance, or other real or personal property is, in whole or in part, owned, possessed, or leased to the United States, or any department or agency of the United States;

(E) the offense is committed in the territorial sea (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) of the United States; or

(F) the offense is committed within the special maritime and territorial jurisdiction of the United States.

(2) Co-conspirators and accessories after the fact. Jurisdiction shall exist over all principals and co-conspirators of an offense under this section, and accessories after the fact to any offense under this section, if at least one of the circumstances described in subparagraphs (A) through (F) of paragraph (1) is applicable to at least one offender.

(c) Penalties.

(1) Penalties. Whoever violates this section shall be punished--

(A) for a killing, or if death results to any person from any other conduct prohibited by this section, by death, or by imprisonment for any term of years or for life;

(B) for kidnapping, by imprisonment for any term of years or for life;

(C) for maiming, by imprisonment for not more than 35 years;

(D) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than 30 years;

(E) for destroying or damaging any structure, conveyance, or other real or personal property, by imprisonment for not more than 25 years;

(F) for attempting or conspiring to commit an offense, for any term of years up to the maximum punishment that would have applied had the offense been completed; and

(G) for threatening to commit an offense under this section, by imprisonment for not more than 10 years.

(2) Consecutive sentence. Notwithstanding any other provision of law, the court shall not place on probation any person convicted of a violation of this section; nor shall the term of imprisonment imposed under this section run concurrently with any other term of imprisonment.

(d) Proof requirements. The following shall apply to prosecutions under this section:

(1) Knowledge. The prosecution is not required to prove knowledge by any defendant of a jurisdictional base alleged in the indictment.

(2) State law. In a prosecution under this section that is based upon the adoption of State law, only the elements of the offense under State law, and not any provisions pertaining to criminal procedure or evidence, are adopted.

(e) Extraterritorial jurisdiction. There is extraterritorial Federal jurisdiction--

(1) over any offense under subsection (a), including any threat, attempt, or conspiracy to commit such offense; and

(2) over conduct which, under section 3, renders any person an accessory after the fact to an offense under subsection (a).

(f) Investigative authority. In addition to any other investigative authority with respect to violations of this title, the Attorney General shall have primary investigative responsibility for all Federal crimes of terrorism, and any violation of section 351(e), 844(e), 844(f)(1), 956(b), 1361, 1366(b), 1366(c), 1751(e), 2152, or 2156 of this title, and the Secretary of the Treasury shall assist the Attorney General at the request of the Attorney General. Nothing in this section shall be construed to interfere with the authority of the United States Secret Service under section 3056.

(g) Definitions. As used in this section--

(1) the term "conduct transcending national boundaries" means conduct occurring outside of the United States in addition to the conduct occurring in the United States;

(2) the term "facility of interstate or foreign commerce" has the meaning given that term in section 1958(b)(2);

(3) the term "serious bodily injury" has the meaning given that term in section 1365(g)(3);

(4) the term "territorial sea of the United States" means all waters extending seaward to 12 nautical miles from the baselines of the United States, determined in accordance with international law; and

(5) the term "Federal crime of terrorism" means an offense that--

(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and

(B) is a violation of--

(i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnaping), 831 (relating to nuclear materials), 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (relating to protection of computers), 1030(a)(5)(A)(i) resulting in damage as defined in 1030(a)(5)(B)(ii) through (v) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1362 (relating to destruction of communication lines, stations, or systems),

1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnaping), 1992 (relating to wrecking trains), 1993 (relating to terrorist attacks and other acts of violence against mass transportation systems), 2155 (relating to destruction of national defense materials, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism, or 2340A (relating to torture) of this title;

(ii) section 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 *(42 U.S.C. 2284)*; or

(iii) section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with a dangerous weapon), section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), section 46506 if homicide or attempted homicide is involved (relating to application of certain criminal laws to acts on aircraft), or section 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility) of title 49.

18 U.S.C. § 2339B

§ 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) Prohibited activities.

(1) Unlawful conduct. Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

(2) Financial institutions. Except as authorized by the Secretary, any financial institution that becomes aware that it has possession of, or control over, any funds in which a foreign terrorist organization, or its agent, has an interest, shall--

(A) retain possession of, or maintain control over, such funds; and

(B) report to the Secretary the existence of such funds in accordance with regulations issued by the Secretary.

(b) Civil penalty. Any financial institution that knowingly fails to comply with subsection (a)(2) shall be subject to a civil penalty in an amount that is the greater of--

(A) $ 50,000 per violation; or

(B) twice the amount of which the financial institution was required under subsection (a)(2) to retain possession or control.

(c) Injunction. Whenever it appears to the Secretary or the Attorney General that any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation of this section, the Attorney General may initiate civil action in a district court of the United States to enjoin such violation.

(d) Extraterritorial jurisdiction. There is extraterritorial Federal jurisdiction over an offense under this section.

(e) Investigations.

(1) In general. The Attorney General shall conduct any investigation of a possible violation of this section, or of any license, order, or regulation issued pursuant to this section.

(2) Coordination with the department of the treasury. The Attorney General shall work in coordination with the Secretary in investigations relating to--

(A) the compliance or noncompliance by a financial institution with the requirements of subsection (a)(2); and

(B) civil penalty proceedings authorized under subsection (b).

(3) Referral. Any evidence of a criminal violation of this section arising in the course of an investigation by the Secretary or any other Federal agency shall be referred immediately to the Attorney General for further investigation. The Attorney General shall timely notify the Secretary of any action taken on referrals from the Secretary, and may refer investigations to the Secretary for remedial licensing or civil penalty action.

(f) Classified information in civil proceedings brought by the United States.

(1) Discovery of classified information by defendants.

(A) Request by United States. In any civil proceeding under this section, upon request made ex parte and in writing by the United States, a court, upon a sufficient showing, may authorize the United States to–

(i) redact specified items of classified information from documents to be introduced into evidence or made available to the defendant through discovery under the Federal Rules of Civil Procedure;

(ii) substitute a summary of the information for such classified documents; or

(iii) substitute a statement admitting relevant facts that the classified information would tend to prove.

(B) Order granting request. If the court enters an order granting a request under this paragraph, the entire text of the documents to which the request relates shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(C) Denial of request. If the court enters an order denying a request of the United States under this paragraph, the United States may take an immediate, interlocutory appeal in accordance with paragraph (5). For purposes of such an appeal, the entire text of the documents to which the request relates, together with any transcripts of arguments made ex parte to the court in connection therewith, shall be maintained under seal and delivered to the appellate court.

(2) Introduction of classified information; precautions by court.

(A) Exhibits. To prevent unnecessary or inadvertent disclosure of classified information in a civil proceeding brought by the United States under this section, the United States may petition the court ex parte to admit, in lieu of classified writings, recordings, or photographs, one or more of the following:

(i) Copies of items from which classified information has been redacted.

(ii) Stipulations admitting relevant facts that specific classified information would tend to prove.

(iii) A declassified summary of the specific classified information.

(B) Determination by court. The court shall grant a request under this paragraph if the court finds that the redacted item, stipulation, or summary is sufficient to allow the defendant to prepare a defense.

(3) Taking of trial testimony.

(A) Objection. During the examination of a witness in any civil proceeding brought by the United States under this subsection, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible.

(B) Action by court. In determining whether a response is admissible, the court shall take precautions to guard against the compromise of any classified information, including--

(i) permitting the United States to provide the court, ex parte, with a proffer of the witness's response to the question or line of inquiry; and

(ii) requiring the defendant to provide the court with a proffer of the nature of the information that the defendant seeks to elicit.

(C) Obligation of defendant. In any civil proceeding under this section, it shall be the defendant's obligation to establish the relevance and materiality of any classified information sought to be introduced.

(4) Appeal. If the court enters an order denying a request of the United States under this subsection, the United States may take an immediate interlocutory appeal in accordance with paragraph (5).

(5) Interlocutory appeal.

(A) Subject of appeal. An interlocutory appeal by the United States shall lie to a court of appeals from a decision or order of a district court--

(i) authorizing the disclosure of classified information;

(ii) imposing sanctions for nondisclosure of classified information; or

(iii) refusing a protective order sought by the United States to prevent the disclosure of classified information.

(B) Expedited consideration.

(i) In general. An appeal taken pursuant to this paragraph, either before or during trial, shall be expedited by the court of appeals.

(ii) Appeals prior to trial. If an appeal is of an order made prior to trial, an appeal shall be taken not later than 10 days after the decision or order appealed from, and the trial shall not commence until the appeal is resolved.

(iii) Appeals during trial. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals--

(I) shall hear argument on such appeal not later than 4 days after the adjournment of the trial;

(II) may dispense with written briefs other than the supporting materials previously submitted to the trial court;

(III) shall render its decision not later than 4 days after argument on appeal; and

(IV) may dispense with the issuance of a written opinion in rendering its decision.

(C) Effect of ruling. An interlocutory appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a final judgment, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

(6) Construction. Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States to protect against the disclosure of classified information, including the invocation of the military and State secrets privilege.

(g) Definitions. As used in this section--

(1) the term "classified information" has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);

(2) the term "financial institution" has the same meaning as in section 5312(a)(2) of title 31, United States Code;

(3) the term "funds" includes coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, stocks, bonds, debentures, drafts, letters of credit, any other negotiable instrument, and any electronic representation of any of the foregoing;

(4) the term "material support or resources" has the same meaning as in section 2339A;

(5) the term "Secretary" means the Secretary of the Treasury; and

(6) the term "terrorist organization" means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act [*8 USCS § 1189*].

18 U.S.C. § 2342

§ 2342. Unlawful acts

(a) It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.

(b) It shall be unlawful for any person knowingly to make any false statement or representation with respect to the information required by this chapter [18 USCS §§ 2341 et seq.] to be kept in the records of any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction.

18 U.S.C. § 3552

§ 3552. Presentence reports

(a) Presentence investigation and report by probation officer. A United States probation officer shall make a presentence investigation of a defendant that is required pursuant to the provisions of *Rule 32(c) of the Federal Rules of Criminal Procedure*, and shall, before the imposition of sentence, report the results of the investigation to the court.

(b) Presentence study and report by Bureau of Prisons. If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a misdemeanor or felony, it may order a study of the defendant. The study shall be conducted in the local community by qualified consultants unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau of Prisons or there are no adequate professional resources available in the local community to perform the study. The period of the study shall be no more than sixty days. The order shall specify the additional information that the court needs before determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for the offense committed. The study shall inquire into such matters as are specified by the court and any other matters that the Bureau of Prisons or the professional consultants believe are pertinent to the factors set forth in section 3553(a). The period of the study may, in the discretion of the court, be extended for an additional period by not more than sixty days. By the expiration of the period of the study, or by the expiration of any extension granted by the court, the United States marshal shall, if the

defendant is in custody, return the defendant to the court for final sentencing. The Bureau of Prisons or the professional consultants shall provide the court with a written report of the pertinent results of the study and make to the court whatever recommendations the Bureau or the consultants believe will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau or the consultants concerning the guidelines and policy statements, promulgated by the Sentencing Commission pursuant to *28 U.S.C. 994*(a), that they believe are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under this chapter [*18 USCS § § 3551* et seq.].

(c) Presentence examination and report by psychiatric or Psychological examiners. If the court, before or after its receipt of a report specified in subsection (a) or (b) desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, the court may order the same psychiatric or psychological examination and report thereon as may be ordered under section 4244(b) of this title.

(d) Disclosure of presentence reports. The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant. The court shall provide a copy of the presentence report to the attorney for the Government to use in collecting an assessment, criminal fine, forfeiture or restitution imposed.

18 U.S.C. § 3553

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.

(1) In general. Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.

[(A)] Sentencing. In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 [*18 USCS § § 1460* et seq., 2241 et seq., 2251 et seq., or 2421 et seq.], the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose

an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with *Federal Rule of Criminal Procedure* 32. In the event that the court relies upon statements received in camera in accordance with *Federal Rule of Criminal Procedure* 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and

commitment, to the Probation System and to the Sentencing Commission,[,] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice. Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum. Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the

Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases. Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act *(21 U.S.C. 841,* 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act *(21 U.S.C. 960,* 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act [*21 USCS § 848];* and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of

conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

21 U.S.C. § 841

§ 841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [*21 USCS § 849*, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18,

United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 8,000,000 if the defendant is an individual or $ 20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [*21 USCS § 849*, 859, 860, or 861] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this

subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999 [*21 USCS § 812* note]), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 1,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the

sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18,

United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 100,000 if the defendant is an individual or $ 250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $

200,000 if the defendant is an individual or $ 500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 404 [*21 USCS § 844*] and section 3607 of title 18, United States Code.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18, United States Code;

(C) $ 500,000 if the defendant is an individual; or

(D) $ 1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution.

(A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

(B) Definition. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals. Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this title;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 310 [*21*

USCS § 830], or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with title 18, United States Code, or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined.

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under title 18, United States Code, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under title 18, United States Code, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty. In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals.

(1) Whoever knowingly distributes a listed chemical in violation of this title (other than in violation of a recordkeeping or reporting requirement of section 310 [*21 USCS § 830]*) shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 310 [*21 USCS § 830]* have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18, United States Code, or imprisoned not more than one year, or both.

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 2101

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.

U.S.S.G. § 2E4.1

§ 2E4.1. Unlawful Conduct Relating to Contraband Cigarettes

(a) Base Offense Level (Apply the greater):

(1) 9; or

(2) the offense level from the table in § 2T4.1 (Tax Table) corresponding to the amount of the tax evaded.

Commentary

Statutory Provision: *18 U.S.C. § § 2342*(a), 2344(a).

Application Note:

1. "Tax evaded" refers to state excise tax.

Background: The conduct covered by this section generally involves evasion of state excise taxes. At least 60,000 cigarettes must be involved. Because this offense is basically a tax matter, it is graded by use of the tax table in § 2T4.1.

U.S.S.G. § 2S1.1

§ 2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level:

(1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or

(2) 8 plus the number of offense levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence; or (iii) an offense involving firearms, explosives, national security, or the sexual exploitation of a minor, increase by 6 levels.

(2) (Apply the Greatest):

(A) If the defendant was convicted under *18 U.S.C. § 1957*, increase by 1 level.

(B) If the defendant was convicted under *18 U.S.C. § 1956*, increase by 2 levels.

(C) If (i) subsection (a)(2) applies; and (ii) the defendant was in the business of laundering funds, increase by 4 levels.

(3) If (A) subsection (b)(2)(B) applies; and (B) the offense involved sophisticated laundering, increase by 2 levels.

Commentary

Statutory Provisions: *18 U.S.C. § § 1956*, 1957, 1960 (but only with respect to unlicensed money transmitting businesses as defined in *18 U.S.C. § 1960*(b)(1)(C)). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions. For purposes of this guideline:

"Crime of violence" has the meaning given that term in subsection (a)(1) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

"Criminally derived funds" means any funds derived, or represented by a law enforcement officer, or by another person at the direction or approval of an authorized Federal official, to be derived from conduct constituting a criminal offense.

"Laundered funds" means the property, funds, or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of *18 U.S.C. § 1956* or § 1957.

"Laundering funds" means making a transaction, financial transaction, monetary transaction, or transmission, or transporting or transferring property, funds, or a monetary instrument in violation of *18 U.S.C. § 1956* or § 1957.

"Sexual exploitation of a minor" means an offense involving (A) promoting prostitution by a minor; (B) sexually exploiting a minor by production of sexually explicit visual or printed material; (C) distribution of material involving the sexual exploitation of a minor, or possession of material involving the sexual exploitation of a minor with intent to distribute; or (D) aggravated sexual abuse, sexual abuse, or abusive sexual contact involving a minor. "Minor" means an individual under the age of 18 years.

2. Application of Subsection (a)(1).

(A) Multiple Underlying Offenses. In cases in which subsection (a)(1) applies and there is more than one underlying offense, the offense level for the underlying offense is to be determined under the procedures set forth in Application Note 3 of the Commentary to § 1B1.5 (Interpretation of References to Other Offense Guidelines).

(B) Defendants Accountable for Underlying Offense. In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be accountable for the underlying offense under § 1B1.3(a)(1)(A). The fact that the defendant was involved in laundering criminally derived funds after the commission of the underlying offense, without additional involvement in the underlying offense, does not establish that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the underlying offense.

(C) Application of Chapter Three Adjustments. Notwithstanding § 1B1.5(c), in cases in which subsection

(a)(1) applies, application of any Chapter Three adjustment shall be determined based on the offense covered by this guideline (i.e., the laundering of criminally derived funds) and not on the underlying offense from which the laundered funds were derived.

3. Application of Subsection (a)(2).

(A) In General. Subsection (a)(2) applies to any case in which (i) the defendant did not commit the underlying offense; or (ii) the defendant committed the underlying offense (or would be accountable for the underlying offense under § 1B1.3(a)(1)(A)), but the offense level for the underlying offense is impossible or impracticable to determine.

(B) Commingled Funds. In a case in which a transaction, financial transaction, monetary transaction, transportation, transfer, or transmission results in the commingling of legitimately derived funds with criminally derived funds, the value of the laundered funds, for purposes of subsection (a)(2), is the amount of the criminally derived funds, not the total amount of the commingled funds, if the defendant provides sufficient information to determine the amount of criminally derived funds without unduly complicating or prolonging the sentencing process. If the amount of the criminally derived funds is difficult or impracticable to determine, the value of the laundered funds, for purposes of subsection (a)(2), is the total amount of the commingled funds.

(C) Non-Applicability of Enhancement. Subsection (b)(2)(B) shall not apply if the defendant was convicted of a conspiracy under *18 U.S.C. § 1956*(h) and the sole object of that conspiracy was to commit an offense set forth in *18 U.S.C. § 1957*.

4. Enhancement for Business of Laundering Funds.

(A) In General. The court shall consider the totality of the circumstances to determine whether a defendant who did not commit the underlying offense was in the business of laundering funds, for purposes of subsection (b)(2)(C).

(B) Factors to Consider. The following is a non-exhaustive list of factors that may indicate the defendant was in the business of laundering funds for purposes of subsection (b)(2)(C):

(i) The defendant regularly engaged in laundering funds.

(ii) The defendant engaged in laundering funds during an extended period of time.

(iii) The defendant engaged in laundering funds from multiple sources.

(iv) The defendant generated a substantial amount of revenue in return for laundering funds.

(v) At the time the defendant committed the instant offense, the defendant had one or more prior convictions for an offense under *18 U.S.C. § 1956* or § 1957, or under *31 U.S.C. § 5313*, § 5314, § 5316, § 5324 or § 5326, or any similar offense under state law, or an attempt or conspiracy to commit any such federal or state offense. A conviction taken into account under subsection (b)(2)(C) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

(vi) During the course of an undercover government investigation, the defendant made statements that the

defendant engaged in any of the conduct described in subdivisions (i) through (iv).

5. (A) Sophisticated Laundering under Subsection (b)(3). For purposes of subsection (b)(3), "sophisticated laundering" means complex or intricate offense conduct pertaining to the execution or concealment of the *18 U.S.C. § 1956* offense.

Sophisticated laundering typically involves the use of--

(i) fictitious entities;

(ii) shell corporations;

(iii) two or more levels (i.e., layering) of transactions, transportation, transfers, or transmissions, involving criminally derived funds that were intended to appear legitimate; or

(iv) offshore financial accounts.

(B) Non-Applicability of Enhancement. If subsection (b)(3) applies, and the conduct that forms the basis for an enhancement under the guideline applicable to the underlying offense is the only conduct that forms the basis for application of subsection (b)(3) of this guideline, do not apply subsection (b)(3) of this guideline.

6. Grouping of Multiple Counts. In a case in which the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, the counts shall be grouped pursuant to subsection (c) of §. 3D1.2 (Groups of Closely-Related Counts).

U.S.S.G. § 2T4.1

§ 2T4.1. Tax Table

Offense Level
Tax Loss (Apply the Greatest):
(A) $ 2,000 or less 6
(B) More than $ 2,000 8
(C) More than $ 5,000 10
(D) More than $ 12,500 12
(E) More than $ 30,000 14
(F) More than $ 80,000 16
(G) More than $ 200,000 18
(H) More than $ 400,000 20
(I) More than $ 1,000,000 22
(J) More than $ 2,500,000 24
(K) More than $ 7,000,000 26
(L) More than $ 20,000,000 28
(M) More than $ 50,000,000 30
(N) More than $ 100,000,000 32
(O) More than $ 200,000,000 34
(P) More than $ 400,000,000 ..... 36.

U.S.S.G. § 3A1.4

§ 3A1.4. Terrorism

(a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.

(b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Commentary

Application Notes

1. "Federal Crime of Terrorism" Defined. For purposes of this guideline, "federal crime of terrorism" has the meaning given that term in *18 U.S.C. § 2332b*(g)(5).

2. Harboring, Concealing, and Obstruction Offenses. For purposes of this guideline, an offense that involved (A) harboring or concealing a terrorist who committed a federal crime of terrorism (such as an offense under *18 U.S.C. §* 2339 or § 2339A); or (B) obstructing an investigation of a federal crime of terrorism, shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism.

3. Computation of Criminal History Category. Under subsection (b), if the defendant's criminal history category as determined under Chapter Four (Criminal History and Criminal Livelihood) is less than Category VI, it shall be increased to Category VI.

4. Upward Departure Provision. By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in *18 U.S.C.* § *2332b*(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in *18 U.S.C.* § *2332b*(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.

U.S.S.G § 3B1.1

§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

Commentary

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised

management responsibility over the property, assets, or activities of a criminal organization.

3. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

4. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. . There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

Background: This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of § 3B1.1(c).

U.S.S.G. § 3C1.1

§ 3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

Commentary

Application Notes:

1. This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant.

2. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

3. Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 4 sets forth examples of the types of conduct to which this adjustment is intended to apply. Application Note 5 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this adjustment applies is not subject to precise definition, comparison of the examples set forth in Application Notes 4 and 5 should assist the court in determining whether application of this adjustment is warranted in a particular case.

4. The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:

(a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

(b) committing, suborning, or attempting to suborn perjury;

(c) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;

(d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled

substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

(e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

(f) providing materially false information to a judge or magistrate;

(g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

(h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;

(i) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., *18 U.S.C. § § 1510,* 1511);

(j) failing to comply with a restraining order or injunction issued pursuant to *21 U.S.C. § 853*(e) or with an order to repatriate property issued pursuant to *21 U.S.C. § 853*(p).

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

5. Some types of conduct ordinarily do not warrant application of this adjustment but may warrant a greater

sentence within the otherwise applicable guideline range or affect the determination of whether other guideline adjustments apply (e.g., § 3E1.1 (Acceptance of Responsibility)). However, if the defendant is convicted of a separate count for such conduct, this adjustment will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 8, below.

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:

(a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;

(b) making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies;

(c) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;

(d) avoiding or fleeing from arrest (see, however, § 3C1.2 (Reckless Endangerment During Flight));

(e) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility).

6. "Material" evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or

information that, if believed, would tend to influence or affect the issue under determination.

7. If the defendant is convicted of an offense covered by § 2J1.1 (Contempt), § 2J1.2 (Obstruction of Justice), § 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), § 2J1.5 (Failure to Appear by Material Witness), § 2J1.6 (Failure to Appear by Defendant), § 2J1.9 (Payment to Witness), § 2X3.1 (Accessory After the Fact), or § 2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense).

8. If the defendant is convicted both of an obstruction offense (e.g., *18 U.S.C. § 3146* (Penalty for failure to appear); *18 U.S.C. § 1621* (Perjury generally)) and an underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of § 3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

9. Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.

No. 04-193

In the Supreme Court of the United States

MOHAMAD Y. HAMMOUD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
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In the Supreme Court of the United States

No. 04-193

MOHAMAD Y. HAMMOUD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). This Court has granted certiorari in *United States* v. *Booker*, No. 04-104 (Aug. 2, 2004), and *United States* v. *Fanfan*, No. 04-105 (Aug. 2, 2004), to consider whether *Blakely* applies to the federal Sentencing Guidelines, and, if so, how federal sentencing should be conducted in light of such a conclusion. If the Court were to hold that *Blakely* applies to the Guidelines, the proper disposition of petitioner's claim could be affected by such a holding (as well as by any applicable doctrines of waiver, forfeiture, and harmless error). Accordingly, the petition for a writ of certiorari should be held pending this Court's decisions in *Booker*

and *Fanfan*, and then disposed of as appropriate in light of the decisions in those cases.*

PAUL D. CLEMENT
Acting Solicitor General

AUGUST 2004

* The government waives any further response to the petition unless this Court requests otherwise.

No. 04-193

FILED

SEP 2 1 2004

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MOHAMAD Y. HAMMOUD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-4253

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MOHAMAD YOUSSEF HAMMOUD,
a/k/a Ali Abousaleh, a/k/a Ali Albousaleh,

Defendant - Appellant,

CENTER FOR CONSTITUTIONAL RIGHTS; NATIONAL COALITION TO PROTECT POLITICAL FREEDOM; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; NATIONAL LAWYERS GUILD,

Amici Supporting Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Graham C. Mullen, Chief District Judge. (CR-00-147-MU)

Argued: August 2, 2004

Decided: September 8, 2004

[Entered: September 8, 2004]

Before WILKINS, Chief Judge, and WIDENER, WILKINSON, NIEMEYER, WILLIAMS, MICHAEL, MOTZ, TRAXLER, KING, GREGORY, SHEDD, and DUNCAN, Circuit Judges.

Affirmed by published opinion. Chief Judge Wilkins wrote the opinion, in which Judges Wilkinson, Niemeyer, Williams, Traxler, King, Shedd, and Duncan joined and in

which Judge Widener joined as to all except Part VII.C. Judge Wilkinson wrote a concurring opinion. Judge Shedd wrote a concurring opinion. Judge Widener wrote a concurring and dissenting opinion. Judge Motz wrote a dissenting opinion, in which Judges Michael and Gregory joined. Judge Gregory wrote a dissenting opinion.

ARGUED: Stanley Lewis Cohen, New York, New York; James P. McLoughlin, Jr., MOORE & VAN ALLEN, PLLC, Charlotte, North Carolina, for Appellant. Demetra Lambros, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** James W. Haldin, MOORE & VAN ALLEN, PLLC, Charlotte, North Carolina, for Appellant. Robert J. Conrad, Jr., United States Attorney, Gretchen C.F. Shappert, United States Attorney, D. Scott Broyles, Assistant United States Attorney, Charlotte, North Carolina; John F. DePue, John Douglas Wilson, Martha Rubio, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. David D. Cole, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C.; Nancy Chang, Shayana Kadidal, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York; Lisa Kemler, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Alexandria, Virginia, for Amici Supporting Appellant.

WILKINS, Chief Judge:

Mohammed Hammoud appeals the sentence imposed following his convictions of numerous offenses, all of which are connected to his support of Hizballah, a designated foreign terrorist organization (FTO). Hammoud also challenges two of his 14 convictions. The appeal was argued before a three-judge panel, but prior to decision the court voted to hear the case en bane in order to consider the effect of Blakely v. Washington, 124 S. Ct. 2531 (2004), on the federal sentencing guidelines.

Following argument en bane, the court entered an order affirming Hammoud's convictions and sentence. See United States v. Hammoud, __ F.3d __, 2004 WL 1730309 (4th Cir. August 2, 2004). We now set forth the reasoning for our judgment.

I. Facts

The facts underlying Hammoud's convictions and sentence are largely undisputed. We therefore recount them briefly.

A. Hizballah

Hizballah is an organization founded by Lebanese Shi'a Muslims in response to the 1982 invasion of Lebanon by Israel. Hizballah provides various forms of humanitarian aid to Shi'a Muslims in Lebanon. However, it is also a strong opponent of Western presence in the Middle East, and it advocates the use of terrorism in support of its agenda. Hizballah is particularly opposed to the existence of Israel and to the activities of the American government in the Middle East. Hizballah's general secretary is Hassan Nasserallah, and its spiritual leader is Sheikh Fadlallah.

B. Hammoud

In 1992, Hammoud, a citizen of Lebanon, attempted to enter the United States on fraudulent documents. After being detained by the INS, Hammoud sought asylum. While the asylum application was pending, Hammoud moved to Charlotte, North Carolina, where his brothers and cousins were living. Hammoud ultimately obtained permanent resident status by marrying a United States citizen.

At some point in the mid-1990s, Hammoud, his wife, one of his brothers, and his cousins all became involved in a cigarette smuggling operation. The conspirators purchased large quantities of cigarettes in North Carolina, smuggled them to Michigan, and sold them without paying Michigan

taxes. This scheme took advantage of the fact that Michigan imposes a tax of $7.50 per carton of cigarettes, while the North Carolina tax is only 50t. It is estimated that the conspiracy involved a quantity of cigarettes valued at roughly $7.5 million and that the state of Michigan was deprived of $3 million in tax revenues.

In 1996, Hammoud began leading weekly prayer services for Shi'a Muslims in Charlotte. These services were often conducted at Hammoud's home. At these meetings, Hammoud--who is acquainted with both Nasserallah and Fadlallah, as well as Sheikh Abbas Harake, a senior military commander for Hizballah--urged the attendees to donate money to Hizballah. Hammoud would then forward the money to Harake. The Government's evidence demonstrated that on one occasion, Hammoud donated $3,500 of his own money to Hizballah.

Based on these and other activities, Hammoud was charged with various immigration violations, sale of contraband cigarettes, money laundering, mail fraud, credit card fraud, and racketeering. Additionally, Hammoud was charged with conspiracy to provide material support to a designated FTO and with providing material support to a designated FTO, both in violation of 18 U.S.C.A. § 2339B (West 2000 & Supp. 2004). The latter § 2339B charge related specifically to Hammoud's personal donation of $3,500 to Hizballah.

At trial, one of the witnesses against Hammoud was Said Harb, who grew up in the same Lebanese neighborhood as Hammoud. Harb testified regarding his own involvement in the cigarette smuggling operation and also provided information regarding the provision of "dual use" equipment (such as global positioning systems, which can be used for both civilian and military activities) to Hizballah. The Government alleged that this conduct was part of the conspiracy to provide material support to

Hizballah. Harb testified that Hammoud had declined to become involved in providing equipment because he was helping Hizballah in his own way. Harb also testified that when he traveled to Lebanon in September 1999, Hammoud gave him $3,500 for Hizballah.

C. Conviction and Sentence

The jury convicted Hammoud of 14 offenses, only a few of which were particularly relevant to the calculation of Hammoud's sentence under the guidelines: money laundering and conspiracy to commit money laundering, see 18 U.S.C.A. § 1956 (a) (1), (h) (West 2000 & Supp. 2004); transportation of contraband cigarettes, see 18 U.S.C.A. § 2342 (West 2000); and providing material support to a designated FTO, see 18 U.S.C.A. § 2339B.

Applying the 2002 Guidelines Manual, the presentencing report (PSR) recommended that the base offense level correspond to the amount of tax evaded in the cigarette smuggling operation. See U.S. Sentencing Guidelines Manual § 2S1.1(a)(1) (2002) (requiring application of "[t]he offense level for the underlying offense from which the laundered funds were derived"); id. § 2E4.1(a) (providing that the offense level for a violation of 18 U.S.C.A. § 2342 is the greater of 9 or "the offense level from the table in §2T4.1 (Tax Table) corresponding to the amount of the tax evaded"). The PSR concluded that the amount of tax evaded was more than $2.5 million, resulting in a base offense level of 24. See id. § 2T4.1(J). The PSR recommended several upward adjustments to this base offense level: two levels for conviction under 18 U.S.C.A. § 1956, see id. § 2S1.1(b)(2)(B); two levels for sophisticated money laundering, see id. § 2S1.1(b) (3); four levels for Hammoud's role as an organizer or leader of criminal activity that involved five or more participants, see id. § 3B1.1(a); and two levels for obstruction of justice, see id. § 3C1.1. Most significantly, the PSR recommended a 12-level enhancement

for committing a terrorist act, see id. § 3A1.4(a). The terrorism enhancement also required that Hammoud be assigned to Criminal History Category (CHC) VI, see id. § 3A1.4(b); otherwise, Hammoud had no criminal history points and would have been placed in CHC I. Ultimately, the PSR recommended assignment of an adjusted offense level of 46 (to be treated as offense level 43, see id. Chapter 5, Part A, comment. (n.2)), which required a sentence of life imprisonment regardless of Hammoud's CHC.

Hammoud filed objections to the PSR, in which he challenged the factual basis for several of the upward adjustments. Hammoud also objected to the calculation of his base offense level, asserting that it was unconstitutional under Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Specifically, Hammoud argued that Apprendi required a jury finding, beyond a reasonable doubt, of the amount of tax loss involved in the offense. Hammoud also challenged the terrorism enhancement under Apprendi, maintaining that the enhancement was invalid without a jury finding that he possessed the requisite mental state. Hammoud made similar arguments against the enhancements for his leadership role and obstruction of justice.

The district court conducted a sentencing hearing at which it rejected all of Hammoud's sentencing challenges. The court therefore concluded that the guidelines provided for a sentence of life imprisonment. Because none of the offenses of conviction carried a statutory maximum of life imprisonment, the district court imposed the maximum sentence on each count and ordered all sentences to be served consecutively. See U.S.S.G. § 5G1.2(d). This resulted in the imposition of a sentence of 155 years.

We begin by addressing Hammoud's numerous challenges to his convictions for providing (and conspiring to provide) material support to a designated FTO. We then consider Hammoud's claim that Blakely operates to invalidate his sentence. Finally, we discuss Hammoud's other challenges to his sentence.

II. Constitutionality of 18 U.S.C.A. § 2339B

Section 2339B, which was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, provides for a maximum penalty of 15 years imprisonment for any person who "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so." 18 U.S.C.A. § 2339B(a)(1). The term "material support" is defined as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C.A. § 2339A(b) (West 2000) [1]

Hammoud maintains that § 2339B is unconstitutional in a number of respects.[2] Because Hammoud failed to bring these challenges before the district court, our review is for plain error. See Fed. R. Crim. P. 52 (b); United States v. Olano, 507 U.S. 725, 731-32 (1993). To establish plain error, Hammoud must show that an error occurred, that the error was plain, and that the error affected his substantial rights. See Olano, 507 U.S. at 732. Even if Hammoud makes this three-part showing, correction of the error remains within

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[1] The definition of "material support" was amended in 2001. See 18 U.S.C.A. § 2339A(b) (West Supp. 2004). We rely on the definition in effect at the time of the offenses.

[2] Hammoud's challenges to the constitutionality of § 2339B are supported by an amicus brief filed by a coalition of civil rights groups.

our discretion, which we "should not exercise . . . unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings." Id. (alteration & internal quotation marks omitted).

A. Freedom of Association

Hammoud first contends that § 2339B impermissibly restricts the First Amendment right of association. See U.S. Const, amend. I ("Congress shall make no law ... abridging .... the right of the people peaceably to assemble ....") . Hammoud concedes (at least for purposes of this argument) that Hizballah engages in terrorist activity. But, he also notes the undisputed fact that Hizballah provides humanitarian aid to citizens of Lebanon. Hammoud argues that because Hizballah engages in both legal and illegal activities, he can be found criminally liable for providing material support to Hizballah only if he had a specific intent to further the organization's illegal aims. Because § 2339B lacks such a specific intent requirement, Hammoud argues that it unconstitutionally restricts the freedom of association. Cf. United States v. Al-Arian, 2004 WL 1769226, at *4-*5, *7-*8 (M.D. Fla. Aug. 4, 2004) (construing § 2339B as requiring proof of specific intent to further illegal activity because less stringent interpretation would raise constitutional questions regarding freedom of association and "due process requirements of personal guilt").

It is well established that "[t]he First Amendment ... restricts the ability of the State to impose liability on an individual solely because of his association with another." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918-19 (1982); see Scales v. United States, 367 U.S. 203, 229 (1961) (noting that a "blanket prohibition of association with a group having both legal and illegal aims . . . [would pose] a real danger that legitimate political expression or association would be impaired"). Therefore, it is a violation of the First Amendment to punish an individual for mere membership

in an organization that has legal and illegal goals. Any statute prohibiting association with such an organization must require a showing that the defendant specifically intended to further the organization's unlawful goals. See Elfbrandt v. Russell, 384 U.S. 11, 15-16 (1966). Hammoud maintains that because § 2339B does not contain such a specific intent requirement, his conviction violates the First Amendment.[3]

Hammoud's argument fails because § 2339B does not prohibit mere association; it prohibits the conduct of providing material support to a designated FTO. Therefore, cases regarding mere association with an organization do not control. Rather, the governing standard is found in United States v. O'Brien, 391 U.S. 367 (1968), which applies when a facially neutral statute restricts some expressive conduct. Such a statute is valid

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

Section 2339B satisfies all four prongs of the O'Brien test. First, § 2339B is clearly within the constitutional power of

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[3] Hammoud relies in part on cases holding that a donation to a political advocacy group is a proxy for speech. See, e.g., Buckley v. Valeo, 424 U.S. 1, 16-17 (1976) (per curiam). Hizballah is not a political advocacy group, however. Therefore, while providing monetary support to Hizballah may have an expressive component, it is not the equivalent of pure political speech. See Humanitarian Law Project v. Reno, 205 F.3d 1130, 1134-35 (9th Cir. 2000) (rejecting argument that material support prohibition is subject to strict scrutiny review under Buckley and similar cases).

the government, in view of the government's authority to regulate interactions between citizens and foreign entities. See Regan v. Wald, 468 U.S. 222, 244 (1984) (holding that restrictions on travel to Cuba do not violate the Due Process Clause). Second, there can be no question that the government has a substantial interest in curbing the spread of international terrorism. See Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2000). Third, the Government's interest in curbing terrorism is unrelated to the suppression of free expression. Hammoud is free to advocate in favor of Hizballah or its political objectives--§ 2339B does not target such advocacy.

Fourth and finally, the incidental effect on expression caused by § 2339B is no greater than necessary. In enacting § 2339B and its sister statute, 18 U.S.C.A. § 2339A, Congress explicitly found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." AEDPA § 301(a)(7). As the Ninth Circuit reasoned,

> [i]t follows that all material support given to [foreign terrorist] organizations aids their unlawful goals. Indeed, ... terrorist organizations do not maintain open books. Therefore, when someone makes a donation to them, there is no way to tell how the donation is used. Further, ... even contributions earmarked for peaceful purposes can be used to give aid to the families of those killed while carrying out terrorist acts, thus making the decision to engage in terrorism more attractive. More fundamentally, money is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts.

Humanitarian Law Project, 205 F.3d at 1136 (footnote omitted). In light of this reasoning, the prohibition on material support is adequately tailored to the interest served and does not suppress more speech than is necessary to further the Government's legitimate goal. We therefore conclude that § 2339B does not infringe on the constitutionally protected right of free association.

B. Overbreadth

Hammoud next argues that § 2339B is overbroad. A statute is overbroad only if it "punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." Virginia v. Hicks, 539 U.S. 113, 118-19 (2003) (internal quotation marks omitted). The overbreadth must be substantial "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." Id. at 120. It is also worth noting that when, as here, a statute is addressed to conduct rather than speech, an overbreadth challenge is less likely to succeed. See id. at 124 ("Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).").

Hammoud argues that § 2339B is overbroad because (1) it prohibits mere association with an FTO, and (2) it prohibits such plainly legitimate activities as teaching members of an FTO how to apply for grants to further the organization's humanitarian aims. As discussed above, § 2339B does not prohibit mere association with an FTO and therefore is not overbroad on that basis. Regarding Hammoud's second overbreadth argument, it may be true that the material support prohibition of § 2339B encompasses some forms of expression that are entitled to

First Amendment protection.[4] Cf. Humanitarian Law Project, 205 F.3d at 1138 (holding that "training" prong of material support definition is vague because it covers such forms of protected expression as "instruct[ing] members of a designated group on how to petition the United Nations to give aid to their group"). Hammoud has utterly failed to demonstrate, however, that any overbreadth is substantial in relation to the legitimate reach of § 2339B. See Hicks, 539 U.S. at 122 ("The overbreadth claimant bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists." (alteration & internal quotation marks omitted)).

C. Vagueness

Hammoud next argues that the term "material support" is unconstitutionally vague. "The void-for-vagueness doctrine requires that penal statutes define crimes so that ordinary people can understand the conduct prohibited and so that arbitrary and discriminatory enforcement is not encouraged." United States v. McLamb, 985 F.2d 1284, 1291 (4th Cir. 1993). In evaluating whether a statute is vague, a court must consider both whether it provides notice to the public and whether it adequately curtails arbitrary enforcement. See Kolender v. Lawson, 461 U.S. 352, 357-58 (1983).

Section 2339B easily satisfies this standard. As noted above, the term "material support" is specifically defined as a number of enumerated actions. Hammoud relies on Humanitarian Law Project, in which the Ninth Circuit ruled that two components of the material support definition--"personnel" and "training"--were vague. See Humanitarian Law Project, 205 F.3d at 1137-38. The possible vagueness of

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[4] A defendant who is prosecuted because his protected speech is incidentally covered by a broader ban on unprotected activity may bring an as-applied challenge. Hammoud is not such a defendant for the reasons previously articulated.

these prongs of the material support definition does not affect Hammoud's conviction, however, because he was specifically charged with providing material support in the form of currency. See United States v. Rahman, 189 F.3d 88, 116 (2d Cir. 1999) (per curiam) (rejecting vagueness challenge because allegedly vague term was not relevant to Appellant's conviction). There is nothing at all vague about the term "currency."

D. Designation of an FTP

Hammoud's final challenge to the constitutionality of § 2339B concerns his inability to challenge the designation of Hizballah as an FTO. Section 2339B(g)(6) defines "terrorist organization" as "an organization designated [by the Secretary of State] as a terrorist organization under [8 U.S.C.A. § 1189 (West 1999 & Supp. 2004)]." Section 1189(a)(8) explicitly prohibits a defendant in a criminal action from challenging a designation. Hammoud argues that his inability to challenge the designation of Hizballah as an FTO is a violation of the Constitution.

Hammoud primarily argues that § 1189 (a) (8) deprives him of his constitutional right to a jury determination of guilt on every element of the charged offense.[5] See United States v. Gaudin, 515 U.S. 506, 509-10 (1995) (holding that the Fifth and Sixth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"). This right has not been violated, however. "[I]n determining what facts must be proved beyond a reasonable doubt the ...

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5 On a related note, Hammoud argues that the designation of an organization as an FTO is a "fact" that increases the available penalty, and therefore must be found by the jury under Apprendi v. New Jersey, 530 U.S. 466 (2000) . Apprendi does not apply here, however, because the designation does not allow an increased penalty beyond that authorized by the elements of the offense (which, as noted in the text, do not include the validity of the FTO designation).

legislature's definition of the elements of the offense is usually dispositive . . . ." McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986). Here, Congress has provided that the fact of an organization's designation as an FTO is an element of § 2339B, but the validity of the designation is not. Therefore, Hammoud's inability to challenge the designation is not a violation of his constitutional rights. See United States v. Bozarov, 974 F.2d 1037, 1045-46 (9th Cir. 1992) (holding that defendant's inability to challenge administrative classification did not violate due process because the validity of the classification was not an element of the offense).

Hammoud next argues that § 1189 (a) violates the nondelegation doctrine because the designation of an organization as an FTO is not subject to judicial review. In the first place, it is not clear whether the nondelegation doctrine requires any form of judicial review. Compare Bozarov, 974 F.2d at 1041-45 (rejecting claim that a congressional delegation of authority was unconstitutional because the agency's action was not subject to judicial review), with Touby v. United States, 500 U.S. 160, 168-69 (1991) (rejecting claim that temporary regulation violated nondelegation doctrine on basis that permanent regulation was subject to judicial review and temporary regulation could be challenged in criminal proceedings) . In any event, an FTO designation is subject to judicial review--the designation may be challenged by the organization itself, see 8 U.S.C.A. § 1189(b).

III. Surveillance Evidence

A. FISA Materials

At trial, the Government introduced into evidence several recorded telephone conversations between Hammoud and others. These recordings were obtained through a wiretap pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C.A. §§ 1801-1862

(West 2003 & Supp. 2004). Hammoud argues that the wiretap authorization was not based upon probable cause; that the official certification that the wiretaps were seeking foreign intelligence information was clearly erroneous; and that the Government failed to take adequate measures to ensure that the invasion of Hammoud's privacy was no greater than necessary.

FISA was enacted to create a framework whereby the Executive could conduct electronic surveillance for foreign intelligence purposes without violating the rights of citizens. See United States v. Squillacote, 221 F.3d 542, 552 (4th Cir. 2000). FISA created a special court composed of district court judges appointed by the Chief Justice of the United States; with certain exceptions not relevant here, a FISA judge must approve in advance all electronic surveillance of a foreign power or its agents. See 50 U.S.C.A. §§ 1802, 1804.

1. Probable Cause

Before authorizing surveillance, a FISA judge must determine that there is probable cause to believe that, as is relevant here, "the target of the electronic surveillance is ... an agent of a foreign power" and that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by ... an agent of a foreign power." 50 U.S.C.A. § 1805(a)(3). A "foreign power" includes "a group engaged in international terrorism or activities in preparation therefor." Id. § 1801(a)(4). An "agent of a foreign power" is "any person who ... knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power." Id. § 1801(b)(2)(C). Hammoud concedes that Hizballah is a foreign power under FISA, but he argues that the Government did not have probable cause to believe that he was an agent of Hizballah.

"[P]robable cause is a fluid concept--turning on the assessment of probabilities in particular factual contexts--

not readily, or even usefully, reduced to a neat set of legal rules." Illinois v. Gates, 462 U.S. 213, 232 (1983). In evaluating whether probable cause exists, it is the task of the issuing judge "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit ..., there is a fair probability" that the search will be fruitful. Id. at 238; see Mason v. Godinez, 47 F.3d 852, 855 (7th Cir. 1995) ("Probable cause means more than bare suspicion but less than absolute certainty that a search will be fruitful.").

Hammoud's motion to suppress the FISA evidence was referred to a magistrate judge, who reviewed the FISA applications and supporting materials in camera and concluded that there was probable cause to believe that Hammoud was an agent of a foreign power. See 50 U.S.C.A. § 1806(f). The magistrate judge therefore recommended denial of the motion to suppress. The district court adopted this recommendation after considering Hammoud's objections to the report and recommendation, independently reviewing the materials, and conducting a hearing.

Having conducted our own de novo review of the materials, see Squillacote, 221 F.3d at 554, we reach the same conclusion as the magistrate judge and the district court. Further, upon review of the materials we are satisfied that the probable cause finding was not based "solely upon ... activities protected by the first amendment to the Constitution of the United States." 50 U.S.C.A. § 1805(a)(3)(A). We will not elaborate on the contents of the materials in light of the Attorney General's assessment that disclosure of the information contained in the application and supporting documents would endanger national security.

2. Certification

An application for a FISA warrant must include a certification by an executive branch official stating, inter alia, that the information sought is foreign intelligence information and that the purpose of the surveillance is to obtain such information.[6] See id. § 1804(a)(7). When the target of surveillance is a United States person, the FISA judge must find that the certification is not clearly erroneous before issuing a warrant. See id. § 1805(a)(5). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

Hammoud asserts that the certification was clearly erroneous for two reasons. First, he maintains that the Government failed to demonstrate that the information it sought to obtain through the proposed electronic surveillance was foreign intelligence information. Second, he claims that obtaining foreign intelligence information was not the "primary purpose" of the surveillance; rather, the purpose of the surveillance was to obtain evidence for use in the criminal investigation. Cf. United States v. Truong Dinh Hung, 629 F.2d 908, 915-16 (4th Cir. 1980) (suppressing fruits of electronic surveillance after date that investigation of defendant became "primarily a criminal investigation").

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[6] When the Government applied for a FISA warrant to conduct electronic surveillance of Hammoud, FISA required a certification that the acquisition of foreign intelligence information was "the purpose" of the surveillance. In 2001, Congress amended FISA to require a certification that the acquisition of foreign intelligence information is "a significant purpose" of the surveillance. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001). For purposes of this appeal, we will assume that the higher standard imposed by the pre-USA PATRIOT Act version of FISA controls.

a. Foreign Intelligence Information

FISA defines "foreign intelligence information" in pertinent part as

> information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—
>
> (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
>
> (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or
>
> (C) clandestine intelligence activities by ... an agent of a foreign power ....

50 U.S.C.A. § 1801(e)(l). We reject Hammoud's contention that there is no evidence to support the Government's certification regarding the character of the information sought to be obtained through electronic surveillance of Hammoud. The materials submitted in connection with the FISA application warrant a conclusion that the certification was not clearly erroneous.

b. Primary Purpose

The Government disputes that FISA requires the collection of foreign intelligence information to be the "primary purpose" of electronic surveillance. Among other things, it notes that Truong, in which this court first articulated the primary purpose test, was a pre-FISA decision. See generally In re Sealed Case, 310 F.3d 717, 722-27 (Foreign Int. Surv. Ct. Rev. 2002) (per curiam) (tracing history of primary purpose requirement and concluding that requirement is not supported by text or legislative history of FISA). However, even if the primary purpose test applies, it is satisfied here. The information in the affidavit

supports a conclusion that the FBI was primarily interested in obtaining foreign intelligence information.[7]

3. Minimization

In his last challenge to the FISA evidence, Hammoud argues that the Government failed to minimize the surveillance of him, as FISA requires. See 50 U.S.C.A. § 1805(a)(4); id. § 1801(h)(1) (defining "minimization procedures" as "specific procedures . . . that are reasonably designed ... to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons"). Hammoud's entire argument on this point consists of two assertions: that "[t]he surveillance records contained no foreign intelligence information" and that the records "contain many conversations about personal matters unrelated to any crime." Br. for Appellant Mohamad Y. Hammoud at 51. We take Hammoud's argument to be that the minimization procedures must have been inadequate because many personal conversations were recorded and obtained during the course of the surveillance.

In enacting FISA, Congress recognized that "no electronic surveillance can be so conducted that innocent conversations can be totally eliminated." S. Rep. No. 95-701, at 39 (1978) (internal quotation marks omitted), reprinted in 1978 U.S.C.C.A.N. 3973, 4008. The minimization requirement obligates the Government to make a good faith

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[7] Hammoud suggests that the FBI should have abandoned the surveillance when it became clear that no foreign intelligence information would be obtained. Hammoud provides no argument supporting this claim, however, and we therefore do not consider it. See Fed. R. App. P. 28(a)(9)(A) (providing that the appellant's brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"); 11126 Baltimore Blvd., Inc. v. Prince George's County, 58 F.3d 988, 993 n.7 (4th Cir. 1995) (en banc) (declining to consider arguments for failure to comply with Rule 28).

effort to minimize the acquisition and retention of irrelevant information. See id. at 39-40. However, it is not always immediately clear into which category a particular conversation falls. A conversation that seems innocuous on one day may later turn out to be of great significance, particularly if the individuals involved are talking in code. Cf. United States v. Salameh, 152 F.3d 88, 154 (2d Cir. 1998) (per curiam) (noting that two conspirators involved in the 1993 bombing of the World Trade Center in New York referred to the plot as the "study" and to relevant materials as "university papers"). In view of these considerations, the mere fact that innocent conversations were recorded, without more, does not establish that the government failed to appropriately minimize surveillance.

B. Canadian Intelligence Summaries

Between February 1996 and September 2000, the Canadian Security Intelligence Service (CSIS) conducted electronic surveillance of a coconspirator in Canada. A number of these recordings were destroyed pursuant to routine procedures. However, summaries and analysis of the conversations were prepared by a CSIS communications analyst shortly after each conversation was recorded. At trial, the Government sought to introduce the factual portions of some of these summaries (the analysis was redacted from the summaries before submission to the jury).

During pretrial proceedings, the district court ruled that the CSIS summaries were admissible as recorded recollections, see Fed. R. Evid. 803(5), and as public records, see id. Rule 803(8). At trial, Hammoud stipulated to the admissibility of the summaries. See J.A. 2827 ("Your Honor, with respect to these exhibits, there's a stipulation among the parties that the Canadian Security Intelligence Service's factual summaries are admissible pursuant to Federal Rule of Evidence 803(5), past recollection recorded exception to hearsay rules and that they are authentic and accurate.").

Hammoud now maintains that admission of the summaries was error. However, all of his arguments are negated by his stipulation; thus, Hammoud waived any objection. See United States v. Aptt, 354 F.3d 1269, 1280 (10th Cir. 2004) (explaining that "[a] defendant is free to waive objections to evidence by stipulation" and that "admission of a stipulated exhibit is not error ..., even if it would not be admissible in the absence of such a stipulation").

IV. Expert Testimony

During trial, the district court allowed Matthew Levitt to testify as an expert regarding terrorist organizations and Hizballah. Hammoud argues that the admission of Levitt's testimony was improper on two grounds: first, that the testimony should have been excluded in light of the Government's failure to comply with a discovery order; and second, that Levitt's testimony failed the standard for the admissibility set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Hammoud also argues that the district court abused its discretion in refusing to allow him to cross-examine Levitt regarding classified matters. We reject all three of these claims.

A. Rule 16 Violation

The district court ordered the Government to produce all discovery by October 31, 2001; the order stated that "[djiscovery produced after that date will not be admitted at trial absent a showing of extreme need." J.A. 347. On November 1, the Government filed a notice of compliance which included a section entitled "Discovery material not yet available to defendants." Id. at 367. In this section, the Government informed the court that it was still seeking the aid of an expert on Hizballah. The Government also acknowledged that it would have to obtain leave of the court prior to offering such expert testimony at trial. In response to a motion filed by Hammoud's codefendant

(Chawki Hammoud, who is Hammoud's brother), the Government informed the court on December 11 that it still had not obtained an expert on Hizballah; the Government stated that "[w]hen it has [found an expert], notice will be given and litigation, including the timeliness of disclosure, can commence." Id. at 410. In the meantime, the Government requested that the motions deadline be extended to account for ongoing discovery.

On April 10, 2002, the Government filed a notice of its intent to call Levitt, see Fed. R. Crim. P. 16(a)(1)(G),[8] and requested leave of the court to admit Levitt's testimony. The Government noted that Levitt expected to complete a summary of his testimony by April 26, at which point it would be submitted to the defense. The Government filed the notice and summary on May 3.

At a hearing concerning the timeliness of the disclosure, Hammoud' s attorney argued that he did not have adequate time to prepare to cross-examine Levitt. However, defense counsel also told the court that neither he nor Hammoud wanted a continuance. Noting that the Government had kept the court and defense counsel apprized of its search for an expert, the district court declined to sanction the Government by excluding Levitt's testimony.

Rule 16 grants the district court substantial discretion in dealing with a violation of a discovery order.[9] See Fed. R. Crim. P. 16(d)(2) (providing that a failure to comply may be remedied by an order directing compliance, a continuance,

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[8] When the Government filed its notice, the relevant provision was Rule 16(a)(1)(E). The rule was amended in 2002, and subsection (a)(1)(E) was relettered (a)(1)(G). There was no change in the text.

[9] The Government contends that it complied fully with Rule 16 because it kept Hammoud and the district court informed of its continuing efforts to secure an expert on Hizballah. This claim is not persuasive, however. The district court set a clear deadline for discovery, and there is no dispute that the deadline passed before the Government identified Levitt.

exclusion of the evidence, or "any other order that is just under the circumstances"); see also United States v. Lopez, 271 F.3d 472, 483 (3d Cir. 2001) ("[O]n its face, the Rule does not require a district court to do anything--Rule 16 merely states that the court 'may' take [one of the enumerated] actions."). In determining what sanction, if any, to impose for a discovery violation, the district court

> must weigh the reasons for the government's delay and whether it acted intentionally or in bad faith; the degree of prejudice, if any, suffered by the defendant; and whether any less severe sanction will remedy the prejudice and the wrongdoing of the government.

United States v. Hastings, 126 F.3d 310, 317 (4th Cir. 1997) . The court must impose the least severe sanction that will "adequately punish the government and secure future compliance." Id. A continuance is the preferred sanction. See United States v. Golvansky, 291 F.3d 1245, 1249 (10th Cir. 2002) ("It would be a rare case where, absent bad faith, a district court should exclude evidence rather than continue the proceedings."). The sanction decision is reviewed for abuse of discretion. See Hastings, 126 F.3d at 316.

Here, the district court acknowledged the Government's discovery violation but elected not to impose a sanction after defense counsel declined to accept a continuance. Its refusal to exclude Levitt's testimony was not an abuse of discretion. The Government made clear, well before the discovery deadline, that it was seeking an expert to testify that Hammoud was the leader of a Hizballah cell. Additionally, the Government detailed its difficulties in obtaining such an expert and promptly identified Levitt when he had been retained. Under these circumstances, the district court did not abuse its discretion in refusing to exclude Levitt's testimony.

B. Daubert

Federal Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The Supreme Court has held that Rule 702 requires the district court to perform a gatekeeping function to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert, 509 U.S. at 589.

When, as here, the proffered expert testimony is not scientific in nature, the district court must still perform the gatekeeping function. See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-49 (1999). In determining whether proffered expert testimony is reliable, the district court has broad discretion to consider whatever factors bearing on validity that the court finds to be useful; the particular factors will depend upon the unique circumstances of the expert testimony involved. See id. at 152-53. "The court, however, should be conscious of two guiding, and sometimes competing, principles": (1) "that Rule 702 was intended to liberalize the introduction of relevant expert evidence"; and (2) "that due to the difficulty of evaluating their testimony, expert witnesses have the potential to be both powerful and quite misleading." Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999) (internal quotation marks omitted).

The district court conducted a Daubert hearing, during which Levitt testified that his expertise regarding Hizballah derived from his previous experience with the FBI and his current employment with a think tank, at which he specialized in Middle Eastern terrorist groups. Levitt testified that as part of his duties, he spent "a lot of [his] time

... on Hizballah." J.A. 2357. Levitt described his general methodology as follows:

> Well, we're talking about a social science here. This is not scientific research. Basic academic intellectual research combined with the techniques I was taught in ... various courses I took as an analyst for the government both taught that the best way to go about making sense of something in the social sciences is to collect as much information as possible and to balance each new incoming piece of information against the body of information that you've built to that point.
>
> ....
>
> ... So it's a constant vetting process. And the more rigorous you are, the better your information will be.

J.A. 2344-45. Levitt further testified that his work was subject to "tremendous peer review," id. at 2345, and that his regular practice was to discuss his findings and conclusions with others to ensure their soundness. Levitt stated that he followed this process in reaching his opinion in this case.

In view of this testimony, the district court did not abuse its discretion in qualifying Levitt as an expert. Levitt identified his methodology as one generally employed in the social sciences, and Hammoud did not challenge this testimony. Additionally, Levitt testified that he actually applied this methodology in reaching his conclusions regarding this case.

Hammoud also argues that Levitt's testimony should have been excluded on the grounds that it was not helpful to the jury. Again, the district court did not abuse its discretion. Levitt testified regarding the structure of Hizballah and identified its leaders. Levitt also explained the significance of Hammoud's contact with those leaders

(most notably Sheikh Fadlallah, the spiritual leader of Hizballah). And, Levitt discussed the nature of Hizballah's funding activities with specific reference to Hammoud's activities. This testimony was critical in helping the jury understand the issues before it.

C. Classified Information

During the Daubert hearing and at trial, the district court prohibited defense counsel from questioning Levitt regarding classified matters relating to Levitt's employment with the FBI. Hammoud maintains that this restriction violated the Classified Information Procedures Act (CIPA), 18 U.S.C.A. App. 3 §§ 1-16 (West 2000 & Supp. 2004), and the Confrontation Clause of the Sixth Amendment. We reject both of these contentions.

1. CIPA

CIPA was enacted in 1980 to combat the problem of "graymail," an attempt by a defendant to derail a criminal trial by threatening to disclose classified information. See S. Rep. No. 96-823, at 2 (1980), reprinted in 1980 U.S.C.C.A.N. 4294, 4295; see also id. at 3 (noting that problem of graymail is not "limited to instances of unscrupulous or questionable conduct by defendants since wholly proper defense attempts to obtain or disclose classified information may present the government with the same Misclose or dismiss' dilemma" (internal quotation marks omitted)), reprinted in 1980 U.S.C.C.A.N. at 4296-97. CIPA requires a criminal defendant who "reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding" to notify the district court and the Government "within the time specified by the court or, where no time is specified, within thirty days prior to trial." 18 U.S.C.A. App. 3 § 5(a). The Government may then request a hearing, at which the district court must determine whether the classified

information in question is relevant and admissible. See id. § 6(a).

During the course of the Daubert hearing regarding Levitt's expert testimony, the district court refused to allow Hammoud to cross-examine Levitt regarding classified matters relating to Levitt's former employment with the FBI. Hammoud argues that this information was relevant and material to his cross-examination of Levitt and that its non-disclosure violated CIPA; he further maintains that the proper remedy for the nondisclosure is exclusion of Levitt's testimony. We disagree.

The triggering event for the imposition of sanctions under CIPA is the Government's refusal to comply with an order of the district court directing the disclosure of classified information. See 18 U.S.C.A. App. 3 § 6(e). Such a refusal must necessarily be preceded by a district court determination that the classified information is relevant and admissible. See id.; United States v. Smith, 780 F.2d 1102, 1105 (4th Cir. 1985) (en bane). Here, however, the district court determined that the classified information related to Levitt's work at the FBI was not relevant because he did not rely on that information in forming his opinion. Because the district court never ordered the disclosure of classified information (and properly so, as we discuss below), the Government never had occasion to refuse to produce the information. We therefore conclude that CIPA is not implicated.[10]

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[10] The timeliness of the CIPA claim also provides a potential basis for rejection of Hammoud's claim. The CIPA issue was first raised by Chawki Hammoud in a motion filed during the course of trial (this motion was joined by Hammoud). Chawki Hammoud acknowledged that his motion was untimely under CIPA § 5(a) but asserted that the untimeliness resulted from the Government's failure to comply with its discovery obligations and therefore should be excused. In view of our conclusion that CIPA is not implicated here for other reasons, we do not address the timeliness of the CIPA claim.

2. Confrontation Clause

Hammoud next maintains that the district court violated his Sixth Amendment right to confront the witnesses against him when the court refused to allow him to cross-examine Levitt regarding classified matters. We conclude that this claim fails because Levitt did not rely on any classified information in forming his opinion regarding Hammoud's membership in Hizballah.

The Constitution guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. Const, amend. VI. "The main and essential purpose of confrontation is to secure for the [defendant] the opportunity of cross-examination." Davis v. Alaska, 415 U.S. 308, 315-16 (1974) (emphasis & internal quotation marks omitted). Indeed, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Id. at 316. Nevertheless, the district court retains "wide latitude ... to impose reasonable limits on ... cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) . We review such limitations for abuse of discretion. See United States v. Turner, 198 F.3d 425, 429 (4th Cir. 1999).

In support of this claim, Hammoud relies on United States v. Baptista-Rodriquez, 17 F.3d 1354 (11th Cir. 1994), in which the Eleventh Circuit ruled that the defendant (Diaz) suffered a Confrontation Clause violation when the district court prohibited him from cross-examining a witness regarding the existence and contents of a classified document. See id. at 1366-67. The document in question related to Diaz's defense that he was working with the FBI at the time of the drug transaction with which he was charged. See id. at 1366-68.

The Government, in contrast, relies on two First Circuit cases, United States v. Anqiulo (Anqiulo I), 847 F.2d 956 (1st Cir. 1988), and United States v. Anqiulo (Anqiulo II) , 897 F.2d 1169 (1st Cir. 1990), both of which involved expert testimony regarding the defendants' relationship to La Cosa Nostra. See Anqiulo II, 897 F.2d at 1187; Anqiulo I, 847 F.2d at 973. The district court prohibited the defendants in each case from questioning the expert about the identity of the informants whose information formed much of the basis for the expert's knowledge of La Cosa Nostra. The First Circuit affirmed, reasoning:

> [T]he experts acknowledged that information gleaned from informants over the course of their FBI careers was part of the vast mix of material that contributed to their background expertise on La Cosa Nostra. This expertise, in turn, enabled them to listen to the tapes and form opinions on defendants' criminal activities. The fact that informant information furnished some part of the experts' background knowledge does notimplicate the sixth amendment. Regardless of the information that contributed to their background expertise, the experts' testimony regarding the particular charges against these defendants was based solely on an analysis of the tape recordings [that were played at trial].

Angiulo II, 897 F.2d at 1188; see Anqiulo I, 847 F.2d at 974 (employing similar reasoning).

We agree with the Government that the situation before us is more akin to the Anqiulo cases than to Baptista-Rodriquez. Levitt stated during the Daubert hearing that while his general knowledge regarding Hizballah derived in part from his classified work with the FBI, he did not rely on any classified information in forming his opinion regarding

Hammoud's relationship to Hizballah. Rather, as did the experts in the Anqiulo cases, Levitt based his opinion regarding Hammoud's Hizballah membership on unclassified surveillance evidence obtained by the Government during the course of its investigation. The classified information therefore was not relevant to the question of Hammoud's guilt, and the district court did not abuse its discretion in refusing to allow cross-examination regarding classified materials.

V. Videotapes

Hammoud next asserts that the district court abused its discretion in allowing the Government to play for the jury some of the Hizballah videotapes found in his apartment. Hammoud claims that the contents of the tapes were irrelevant and, alternatively, that if the tapes were relevant, they were unduly prejudicial. See Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ....").[11] Hammoud also argues that the manner in which the Government presented the videotape evidence unfairly prejudiced him. We review the evidentiary rulings of the district court for abuse of discretion. See United States v. Leftenant, 341 F.3d 338, 342 (4th Cir. 2003), cert, denied, 124 S. Ct. 1183 (2004). Hammoud's challenge to the means of presenting the

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[11] Hammoud also cites Rule 404(b), which prohibits—with certain exceptions—the admission of prior bad acts that are extrinsic to the crime charged in order "to prove the character of a person in order to show action in conformity therewith." Fed. R. Crim. P. 404(b); see United States v. Hicrcrs, 353 F.3d 281, 311 (4th Cir. 2003), petition for cert, filed. No. 03-10498 (U.S. May 21, 2004). Rule 404(b) is simply not relevant here. To the extent the "bad act" is the playing of the videotapes during Thursday night prayer meetings, it was intrinsic to the charged crime of providing material support to Hizballah. To the extent the "bad act" was the activities depicted in the videotapes, none of the tapes depicted actions by Hammoud, and the character of the people depicted in the tapes was not at issue.

videotape evidence will succeed only if "the conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." United States v. Scheetz, 293 F.3d 175, 185 (4th Cir. 2002) (internal quotation marks omitted).

A. Relevance

The indictment alleged that as one of the overt acts of the conspiracy to provide material support to an FTO, Hammoud conducted meetings in his home during which he spoke about Hizballah operations and played Hizballah videotapes. At trial, the Government sought to prove that the meetings were not solely religious meetings, as Hammoud contended, but rather were integral to the operation of a Hizballah cell in Charlotte. In support of this claim, the Government played excerpts from some of the videotapes seized from Hammoud's home. The segments played by the Government included speeches by Hizballah leaders praising men who had martyred themselves and crowds shouting "Death to America" and "Death to Israel." J.A. 2225. Another tape depicted a group swearing to become martyrs "to shake the grounds under our enemies, America and Israel." Id. at 2388 (internal quotation marks omitted). Most significantly, some of the tapes depicted Hizballah military operations and encouraged donations from those who could not participate directly in Hizballah operations.

We conclude that the district court did not abuse its discretion in ruling that the excerpts played for the jury were relevant. The excerpts played for the jury are probative of Hammoud' s intent during the prayer meetings--i.e., to solicit donations to Hizballah--and his knowledge of, and agreement with, the terrorist objectives of Hizballah.

B. Unfair Prejudice

Hammoud also argues that even if the tapes were relevant, they should have been excluded because their probative value was substantially outweighed by the danger of unfair prejudice. Rule 403 requires exclusion of evidence "only in those instances where the trial judge believes that there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence." United States v. Powers, 59 F.3d 1460, 1467 (4th Cir. 1995) (internal quotation marks omitted). The mere fact that the evidence will damage the defendant's case is not enough--the evidence must be unfairly prejudicial, and the "unfair prejudice must substantially outweigh the probative value of the evidence." United States v. Grimmond, 137 F.3d 823, 833 (4th Cir. 1998) (internal quotation marks omitted) (emphasis added).

In advocating for the admissibility of the video excerpts, the Government relies on United States v. Salameh, 152 F.3d 88 (2d Cir. 1998) (per curiam). In Salameh, the Second Circuit addressed a Rule 403 challenge to the admission of certain materials--including a video of the bombing of an American embassy and instructions for making bombs--in the trial of those accused of the 1993 World Trade Center bombing. See id. at 110. The court concluded that the district court had not abused its discretion in ruling that the materials were not unfairly prejudicial, reasoning that even though the items "bristled with strong anti-American sentiment and advocated violence against targets in the United States," the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Id. at 111.

In arguing that the video excerpts were unfairly prejudicial, Hammoud relies on United States v. Ham, 998 F.2d 1247 (4th Cir. 1993), and United States v. Merino-

Balderrama, 146 F.3d 758 (9th Cir. 1998). In Ham, this court reversed a conviction on the basis that evidence of defendants' homosexuality and of rampant child molestation in a religious community headed by the defendants was unduly prejudicial. See Ham, 998 F.2d at 1252-54. We concluded that the evidence was highly prejudicial and that its probative impact was limited because, although relevant to prove motive for the charged murder, it was neither "direct" nor "essential" proof of motive. Id. at 1253.

In Merino-Balderrama, the Ninth Circuit reversed a conviction for possession of child pornography on the basis that the district court abused its discretion in allowing the Government to play for the jury excerpts of films containing child pornography that had been found in the defendant's possession. See Merino-Balderrama, 146 F.3d at 760. The defendant had offered to stipulate that the tapes contained child pornography. The court held that in view of the proffered stipulation, the Government would only be required prove scienter, i.e., that the defendant knew the films contained child pornography. And, the court concluded that in light of the covers of the films--photographs making clear that the film was child pornography—the probative value of the contents of the films was outweighed by their prejudicial impact. See id. at 762-63.

We conclude that the district court did not abuse its discretion in allowing the Government to play portions of the tapes for the jury. As noted above, the Government was required to demonstrate that Hammoud knew of Hizballah's unlawful activities, and the contents of the videos were probative evidence of Hammoud's knowledge. The tapes also provided evidence of Hammoud's motive in raising funds for Hizballah and tended to contradict Hammoud's claim that he sympathized only with the humanitarian goals of the organization. See Salameh, 152

F.3d at 111 (noting that even though motive is not an element of any offense, "evidence offered to prove motive is commonly admitted"). This case is thus unlike Ham, in which the proffered evidence was neither directly relevant to motive nor highly probative of motive. And, unlike in Merino-Balderrama, there was no less prejudicial alternative for the Government in proving Hammoud's knowledge of Hizballah's activities.[12]

C. Manner of Presentation

Hammoud also challenges the manner in which the Government presented the videotapes, arguing that the tapes were repeatedly rewound and replayed in order to heighten their prejudicial impact. The record does not bear out this claim. The Government played the tapes for the jury while a linguist translated the statements being made. At several points, the linguist asked for the tape to be rewound because his translation had fallen behind the action on the video. The following is a representative episode:

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[12] Hammoud notes that he offered to stipulate that the tapes were found in his home and that they were produced by Hizballah. Even if such a stipulation had been accepted, however, it still would not relieve the Government of the burden of demonstrating that Hammoud knew that Hizballah engaged in terrorist activity. See United States v. Hill, 249 F.3d 707,- 712 (8th Cir. 2001) (noting that the defendant's offer to stipulate to the element of intent did not alleviate the Government's obligation to prove intent).

Hammoud also suggests that the district court was required to accept his stipulation under United States v. Old Chief, 519 U.S. 172, 174 (1997), in which the Supreme Court held that in a prosecution for being a felon in possession of a firearm, a defendant must be allowed to stipulate to his status as a felon. Old Chief does not mandate the acceptance of all offered stipulations, however. The Court noted that its ruling was an exception to the general rule that "the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." Id. at 186-87. We have limited Old Chief to its facts. See Grimmond, 137 F.3d at 833 n.14. In any event, as noted above, the videotapes were admissible to prove facts beyond the scope of Hammoud's stipulation.

___Our slogan was, is and will remain to be Death to Israel. And the crowd repeats the same thing three times.

Mr. Nasserallah says, And along The Resistance path -- can you rewind it just a little?

It says, Along The Resistance path, our bodies bleed, our bodies fall to the ground and our heads tumble above our heads -- I'm sorry, our houses tumble above our heads.

It says -- I'm sorry, can you rewind just a little bit?

Okay. He talks -- I missed that part because of the rewinding, but he talks about The Resistance continues....

J.A. 2227. We see nothing improper or prejudicial in rewinding the videos so that the translator could keep up.

Hammoud further asserts that it was improper for the Government to use a translator at all--he contends that the Government should have simply played the tapes and allowed the jury to follow along with a printed translation. We disagree. It would have been exceedingly difficult, if not impossible, for a jury to follow along with a written, English translation of a videotape filmed entirely in Arabic. The district court did not abuse its discretion in determining that playing the video with simultaneous oral translation was a more effective and helpful way of presenting the evidence to the jury.

VI. Miscellaneous Challenges to Convictions

Hammoud raises several additional challenges to his convictions that may be addressed more briefly.

A. Constructive Amendment

Count 71 of the indictment alleged that the Charlotte Hizballah cell was a racketeering enterprise, one of the purposes of which was the donation of illegally acquired funds to Hizballah. Count 72 of the indictment charged Hammoud and others with conspiracy to provide material support to a designated FTO. Count 72 included allegations regarding Hammoud's activities in Charlotte as well as Said Harb's involvement in procuring "dual-use" equipment in Canada. Hammoud argues that the Government (through its presentation of evidence and closing argument) and the district court (through its instructions to the jury) constructively amended the indictment by effectively combining counts 71 and 72 into a single charge. See United States v. Floresca, 38 F.3d 706, 710 (4th Cir. 1994) (en bane) ("A constructive amendment to an indictment occurs when either the government ..., the court ..., or both, broadens the possible bases for conviction beyond those presented by the grand jury.").

Counts 71 and 72 were clearly separate charges, and the district court properly instructed the jury as to each. During his closing argument, Hammoud's counsel argued that while the indictment charged a single conspiracy in count 72, the evidence supporting that count actually demonstrated the existence of two conspiracies--one in Canada, involving the procurement of equipment, and one in Charlotte.[13] In response to this claim, the Government argued in rebuttal that the evidence in support of count 72 established the existence of a single conspiracy.

During deliberations, the jury repeatedly asked questions about count 72, even after it had reached a verdict on all of the other counts, including count 71. In particular, the jury asked whether, in order to convict, it had to

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[13] Counsel then argued that the Government had failed to prove the existence of a conspiracy in Charlotte.

conclude that the Canadian activities and the Charlotte activities were part of the same conspiracy. In response, and apparently without objection from Hammoud, the district court repeated its instruction regarding single and multiple conspiracies.

Subsequently, the jury asked a question that neither the court nor the parties understood: "Do we have to find one conspiracy or a conspiracy out of multiple utilizing only some of the manner and means of conspiracy." J.A. 3648 (internal quotation marks omitted) . The response of the court, as recorded in the transcript, was equally confusing: "You must find, in order to convict on Count 72, that there was a single conspiracy, not multiple conspiracies. Multiple conspiracies with a common goal. Not what was charged." Id. The first sentence is a correct instruction; the second and third sentences, however, arguably contradicted it. A short time later, the jury asked two additional questions: "Is Count 72 that there's one single and only one conspiracy to be proved?" and "Does it necessarily have to include all of the matter and means of the conspiracy as alleged in the count?" Id. at 3649 (internal quotation marks omitted). The district court correctly answered the first question "yes" and the second question "no."

Hammoud construes all of this discussion regarding count 72 as a discussion regarding counts 71 and 72, and he alleges that the district court improperly combined the two counts. As should be clear from the above discussion, this is not at all what happened. All of the questions from the jury concerned whether count 72 involved a single conspiracy or multiple conspiracies. Therefore, there was no constructive indictment.

B. Cross-Examination of Hammoud

Hammoud testified in his own defense, asserting that he supported the humanitarian work of Hizballah but not its terrorist activities. On cross-examination, the Government

questioned Hammoud regarding his awareness of violent acts by Hizballah. Hammoud now asserts that such questions constituted "fearmongering" and violated his right to a fair trial. We conclude that there was no error here because the prosecutor's questions were intended to undermine Hammoud's claim that he supported only the humanitarian aims of Hizballah and that he disagreed with the violent tactics employed by Hizballah.

C. Testimony Regarding Dual-Use Equipment

In his final challenge to his convictions, Hammoud asserts that the district court should not have allowed expert testimony regarding the possible aviation applications of equipment purchased in Canada by Said Harb and others, arguing that the sole purpose of such testimony was to "instill[] fear and prejudice in a post-September 11 jury." Br. for Appellant Mohamad Y. Hammoud at 112. We agree with the Government that this testimony was relevant to prove the "material support" conspiracy charged in Count 72 of the indictment and was not unfairly prejudicial.

The admission of this testimony was not plain error.

VII. Blakely v. Washington

We now turn to the issue that prompted us to hear this case en banc: the effect of Blakely on the federal sentencing guidelines.[14] The question we must address is whether the rationale of Blakely (and Apprendi before it) requires indictment and a jury finding, beyond a reasonable doubt,

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[14] In the district court and on appeal, Hammoud argued that under Apprendi v. New Jersey, 530 U.S. 466 (2000), the facts underlying the terrorism enhancement and the amount of tax loss should have been alleged in the indictment and found by the jury beyond a reasonable doubt. These claims are now subsumed by Hammoud's claim, articulated in his supplemental brief, that Blakely requires all facts that result in an increased offense level to be charged in the indictment and found by the jury beyond a reasonable doubt. We therefore do not address them separately.

of facts that result in an increase in the offense level and corresponding guideline range. Little more than a month after Blakely was handed down, the federal courts are already divided over this question. The Seventh and Ninth Circuits have ruled that Blakely does impact the guidelines. See United States v. Ameline, 376 F.3d 967, 974 (9th Cir. 2004); United States v. Booker, 375 F.3d 508, 511 (7th Cir. 2004) ("Blakely dooms the guidelines insofar as they require that sentences be based on facts found by a judge."), cert. granted, 73 U.S.L.W. 3073 (U.S. Aug. 2, 2004) (No. 04-104). In contrast, the Fifth and Sixth Circuits have held that Blakely does not affect the guidelines. See United States v. Koch, 2004 WL 1870438, at *1 (6th Cir. Aug. 13, 2004) (en bane) (order affirming judgment of the district court) ("We hold ... that the decision of the U.S. Supreme Court in Blakely ... does not invalidate the appellant's sentence under the federal Sentencing Guidelines."); United States v. Pineiro, 377 F.3d 464, 465-66 (5th Cir. 2004) ("Having considered the Blakely decision, prior Supreme Court cases, and our own circuit precedent, we hold that Blakely does not extend to the federal Guidelines ...."). The Second Circuit certified questions regarding the application of Blakely to the guidelines to the Supreme Court, see United States v. Penaranda, 375 F.3d 238, 247 (2d Cir. 2004), but in the meantime has declined to apply Blakely to the guidelines, see United States v. Mincey, 2004 WL 1794717, at *3 (2d Cir. Aug. 12, 2004) (per curiam) . Other circuits have acknowledged the potential impact of Blakely on the guidelines but have not directly addressed the question. See, e.g.. United States v. Duncan, 2004 WL 1838020, at *3-*5 (11th Cir. Aug. 18, 2004) (holding that any Blakelv error was not "plain" under plain error standard of review); United States v. Cianci, 378 F.3d 71, 107 (1st Cir. 2004) (deferring decision on sentencing issues pending supplemental briefing regarding Blakelv). And, on the day we heard argument in this case, the Supreme Court granted certiorari in two cases involving Blakelv and the federal sentencing

guidelines. See United States v. Booker, 73 U.S.L.W. 3073 (U.S. Aug. 2, 2004) (No. 04-104); United States v. Fanfan, 73 U.S.L.W. 3073 (U.S. Aug. 2, 2004) (No. 04-105). These cases are scheduled for argument on October 4, 2004.

On close examination of Blakely, we conclude that the Supreme Court simply applied--and did not modify--the rule articulated in Apprendi. We have previously held that the rule of Apprendi does not affect the application of the guidelines. See United States v. Kinter, 235 F.3d 192, 198-202 (4th Cir. 2000). Nothing in Blakelv requires us to abandon our prior holding. We therefore decline to apply the holding of Blakelv to the guidelines.

A. Blakelv

1. Determinate Sentencing in Washington State

All felonies in Washington State are legislatively classified as either A, B, or C felonies. See Wash. Rev. Code § 9A.20.010(b) (Westlaw 2004). For crimes committed after July 1, 1984, Washington statutory law provides a maximum term of imprisonment of life for Class A felonies, a maximum sentence of ten years for Class B felonies, and a maximum sentence of five years for Class C felonies. See id. § 9A.20.021 (1) (Westlaw 2004).

In addition to the maximum penalties specified in the felony classification statutes, the Washington State Sentencing Reform Act of 1981 created a second level of statutory sentencing. Under this system, each criminal offense is characterized according to its seriousness level, ranging from Level I for relatively minor offenses such as "malicious mischief 2" up to Level XVI for "aggravated murder 1." Wash. Rev. Code § 9.94A.515 (Westlaw 2004). Also, every convicted criminal defendant is assigned an offender score based largely on the defendant's prior criminal history. See id. § 9.94A.525 (Westlaw 2004). The statute also sets forth a sentencing grid that prescribes a

minimum and maximum sentence based on the offense seriousness level and the offender score. See id. § 9.94A.510 (Westlaw 2004).[15]

The trial court must sentence the defendant within this statutory sentencing range unless "there are substantial and compelling reasons justifying an exceptional sentence" above or below the prescribed range. Id. § 9.94A.535 11 (Westlaw 2004). Factual findings underlying an exceptional sentence are to be made by the court, employing a preponderance-of-the-evidence standard. See Wash. Rev. Code § 9.94A.530(2) (Westlaw 2004).

The calculations underlying the selection of the sentencing range are reviewable on appeal, but the choice of a particular sentence within the statutory range is not. See State v. McCorkle, 973 P.2d 461, 462 (Wash. 1999) (en bane). However, on appeal from an exceptional sentence the reviewing court will assess the validity of, and the factual support for, the departure and will consider whether the sentence imposed is excessive. See State v. Halaren, 971 P.2d 512, 514-15 (Wash. 1999) (en bane).

The Washington guidelines are legislatively determined. Washington State does have a sentencing guidelines commission, but its role is wholly advisory—the legislature has never delegated its authority to set sentencing policy. See Wash. Rev. Code § 9.94A.850 (2) (a)- (c) (Westlaw 2004); David Boerner & Roxanne Lieb, Sentencing Reform in the Other Washington, 28 Crime & Just. 71, BBSS (2001) (noting that "the Washington commission's role was advisory from the beginning" and that "[t]he legislature retained its authority over sentencing, with the guidelines commission serving in an advisory capacity"); State of Wash. Sentencing Guidelines Comm'n, Powers and Duties of the Commission,

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[15] Drug offenses are sentenced pursuant to a separate sentencing grid based on a three-level system of offense seriousness. See id. §§ 9.94A.517-.518 (Westlaw 2004).

at http://www.sac.wa.gov/powersandduties.htm (last visited Aug. 25, 2004) (stating that the statutory mandate of the commission is limited to "[e]valuating and monitoring adult and juvenile sentencing policies and practices and recommending modifications to the Governor and the Legislature" and "[sjerving as a clearinghouse and information center on adult and juvenile sentencing").

2. The Decision in Blakely

In October 1998, Ralph Howard Blakely, Jr. accosted his wife at their home, binding her with duct tape and forcing her at knife point to climb into a "coffin-like plywood box" in the bed of his pickup truck. State v. Blakely, 47 P.3d 149, 152 (Wash. Ct. App. 2002) . As he did so, he importuned her to dismiss the divorce suit and trust proceedings she had instituted against him. After the couple's son, Ralphy, arrived at the home, Blakely drove away with his wife in the back of the truck. Blakely forced 13-year-old Ralphy to follow in Mrs. Blakely's car, threatening to harm Ralphy's mother if he did not comply. Ralphy escaped when the family stopped at a gas station; Blakely continued with his wife to a friend's house in Montana. The friend subsequently called the police, and Blakely was arrested without incident.

Blakely pleaded guilty to one count of second degree domestic violence kidnaping and one count of second degree domestic violence assault. Under the felony classification system, second degree kidnaping (committed without a sexual motivation) is a Class B felony subject to a maximum penalty of ten years. See Wash. Rev. Code § 9A.40.030(3)(a) (Westlaw 2004) . Under the Sentencing Reform Act, second degree kidnaping is a level V offense; this level, combined with Blakely's offender score, resulted in a statutory sentencing range of 49-53 months. Thus, according to Washington State law, the statutory maximum sentence was 53 months. The prosecution recommended

that Blakely be sentenced at or near the maximum. Instead, the trial court imposed an exceptional sentence of 90 months based on its finding that Blakely had acted with deliberate cruelty and that he had committed domestic violence in front of his son. See Wash. Rev. Code § 9.94A.535(2)(a), (2)(h)(ii) (Westlaw 2004).

After the state court of appeals affirmed and the state supreme court denied discretionary review, the United States Supreme Court granted certiorari and reversed, holding that the exceptional sentence violated the constitutional principles articulated in Apprendi. See Blakely, 124 S. Ct. at 2536-38. The Court began by noting the precise manner in which the sentencing scheme at issue in Apprendi had offended the Constitution: "the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." Id. at 2537. The Court found the same defect in Blakely's sentence, noting that the trial court imposed an exceptional sentence because Blakely had acted with deliberate cruelty--a fact not admitted by Blakely in connection with his plea.

The Court rejected the State's claim that there was no Apprendi problem because even the exceptional sentence was within the ten-year maximum applicable to Class B felonies:

> Our precedents make clear ... that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

Id. (citations omitted). The Court concluded that this "statutory maximum" was 53 months, the top of the statutory sentencing range, because the sentencing judge could not exceed that maximum without making additional factual findings. See id. at 2538 ("Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed."). Therefore, the Court ruled, "[t]he 'maximum sentence' is no more 10 years here than it was 20 years in Apprendi (because that is what the judge could have imposed upon finding a hate crime) or death in RingF v. Arizona, 536 U.S. 584 (2002)] (because that is what the judge could have imposed upon finding an aggravator)." Id. The Court also rejected as "immaterial" the State's assertion that the sentence did not run afoul of Apprendi because the list of aggravating factors in the state sentencing guidelines is illustrative rather than exhaustive: "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in Apprendi) , one of several specified facts (as in Ring), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence." Id.

B. Application of Blakely to the Guidelines

Shortly after Apprendi was decided, we held that it did not affect the sentencing guidelines. See United States v. Kinter, 235 F.3d 192, 198-202 (4th Cir. 2000). While we acknowledged that the argument for applying Apprendi to the guidelines was "not without support," id. at 200, we ultimately concluded that the claim failed in light of the quintessentially judicial nature of the tasks performed by the Sentencing Commission, see id. at 201 ("[T]he Commission's act of establishing sentencing ranges in the Guidelines is categorically different from the legislative act of setting a maximum penalty in a substantive criminal statute."); id. ("The Sentencing Guidelines do not create crimes. They merely guide the discretion of district courts in

determining sentences within a legislatively-determined range ...."). We now re-examine this question in light of Blakely.

Blakely did not change--indeed, it reaffirmed--the question we must ask in determining whether application of the federal sentencing guidelines is subject to the rule of Apprendi: When a defendant is to be sentenced pursuant to the guidelines, what is the "prescribed statutory maximum"? After Apprendi but before Blakely, this and the other circuit courts of appeals had unanimously concluded that the maximum the defendant could receive "if punished according to the facts reflected in the jury verdict alone," Apprendi, 530 U.S. at 483, was the maximum penalty provided in the statute setting forth the offense of conviction (or whatever penalty statute was referenced by the statute setting forth the offense of conviction), not the top of the guideline sentencing range mandated by those facts. See United States v. Reves-Echevarria, 345 F.3d 1, 6-7 (1st Cir. 2003); United States v. Garcia, 240 F.3d 180, 182-84 (2d Cir. 2001); United States v. Williams, 235 F.3d 858, 862-63 (3d Cir. 2000); United States v. Doggett, 230 F.3d 160, 166 (5th Cir. 2000); United States v. Lawrence, 308 F.3d 623, 634-35 (6th Cir. 2002); United States v. Knox, 301 F.3d 616, 620 (7th Cir. 2002); United States v. Walker, 324 F.3d 1032, 1041 (8th Cir.), cert. denied, 124 S. Ct. 247 (2003); United States v. Ochoa, 311 F.3d 1133, 1135-36 (9th Cir. 2002); United States v. Jackson, 240 F.3d 1245, 1249 (10th Cir. 2001); United States v. Harris, 244 F.3d 828, 829-30 (11th Cir. 2001); United States v. Fields, 251 F.3d 1041, 1043-44 (D.C. Cir. 2001).

Blakely not only did not change the inquiry we must make, it also adhered to the rule the Court had announced in Apprendi: "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Blakely, 124 S. Ct. at 2536 (quoting Apprendi, 530 U.S. at 490, and explaining

that "[t]his case requires us to apply the rule we expressed in Apprendi" (emphasis added)). Therefore, in view of the fact that Blakelv changed neither the question nor the rule for answering the question, we must determine what it is in Blakely that has prompted some courts to abandon the previously held view that the rule of Apprendi does not affect the guidelines. We think the most likely culprit is the broad language found in parts of Blakely, particularly the following passage:

> Our precedents make clear ... that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See Ring, supra, at 602 ("^the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting Apprendi, supra, at 483)); Harris v. United States, 536 U.S. 545, 563 (2002) (plurality opinion) (same); cf. Apprendi, supra, at 488 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, supra, § 87, at 55, and the judge exceeds his proper authority.

Blakelv, 124 S. Ct. at 2537 (parallel citations omitted).

In light of this language, it is hardly surprising that several courts have held that Blakely signals the demise of the guidelines. See, e.g., Booker, 375 F.3d at 511. Viewing the above-quoted passage alone, and noting the quotation marks surrounding the term "statutory maximum," it is not that far-fetched to conclude that the Court intended to

encompass within its holding any situation in which a binding maximum--whether statutory or not--is increased by virtue of a judicial finding. Indeed, Justices O'Connor and Breyer expressed concern that the decision in Blakely necessarily implied the invalidity of important aspects of the federal guidelines system. See Blakely, 124 S. Ct. at 2550 (O'Connor, J., dissenting) ("If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would."); id. at 2561 (Breyer, J., dissenting) ("Until now, I would have thought the Court might have limited Apprendi so that its underlying principle would not undo sentencing reform efforts. Today's case dispels that illusion.... Perhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how.").

We think that those courts which have held that the Blakely Court redefined the term "statutory maximum," see Booker, 375 F.3d at 514, have failed to account for the factual and legal context in which Blakely was decided. Under Apprendi, a jury verdict or plea of guilty authorizes the sentencing judge to impose a sentence up to the legislatively prescribed maximum specified in the statute that sets forth the offense of conviction. See Apprendi, 530 U.S. at 482 (noting that "the judge's task in sentencing is to determine, within fixed statutory or constitutional limits, the type and extent of punishment after the issue of guilt has been resolved" (alteration & internal quotation marks omitted)). Blakely required the Court to apply this principle to a sentencing scheme involving two legislatively prescribed statutory maximum penalties. See Blakely, 124 S. Ct. at 2537 (describing the top of the sentencing range under the Washington State Sentencing Reform Act as a "statutory maximum"); Booker, 375 F.3d at 518 (Easterbrook, Circuit Judge, dissenting) ("Blakely arose from a need to designate one of two statutes as the 'statutory maximum'.").

This understanding of Blakely is consistent with Apprendi, in which the Court repeatedly used language indicating that jury protections come into play when legislatively prescribed penalties are at issue.[16] See Apprendi, 530 U.S. at 481 (noting history of judicial discretion to sentence "within the range prescribed by statute" (emphasis omitted)); id. (observing that "our periodic recognition of judges' broad discretion in sentencing . . . has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature" (emphasis added)); id. at 484 (noting heightened stigma that attaches when a defendant "faces punishment beyond that provided by statute" (emphasis added)); id. at 4 87 n.13 (limiting McMillan "to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict" (emphasis added)); id. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added)) . There is no reason to believe that this explicit linking of Sixth Amendment rights to legislatively prescribed penalties was ill-considered or accidental. Cf. Booker, 375 F.3d at 518 (Easterbrook, Circuit Judge, dissenting) ("Why did the Justices deploy that phrase ['statutory maximum'] in Apprendi and repeat it in Blakely (and quite a few other decisions)? Just to get a chuckle at the expense of other judges who took them seriously and thought that 'statutory maximum' might have something to do with statutes? Why write 'statutory maximum' if you mean 'all circumstances that go into ascertaining the proper sentence'?").

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[16] A proper reading of Blakely also allows us to take the Court at its word when it stated that it was "apply[ing]" the rule of Apprendi, not modifying it.

Our understanding of Blakely also comports with the prior guidelines decisions of the Supreme Court. The Court has upheld guidelines sentencing against every constitutional challenge thus far brought before it; a holding that Blakely renders important aspects of guidelines sentencing unconstitutional would undermine, if not outright nullify, several of these decisions.[17]

We begin with Mistretta v. United States, 488 U.S. 361 (1989), in which the Supreme Court upheld the constitutionality of the guidelines against nondelegation and separation of powers challenges. Characterizing the guidelines as "Congress' considered scheme for resolving the seemingly intractable dilemma of excessive disparity in criminal sentencing," id. at 384, the Court concluded that

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[17] United States v. Dunnigran, 507 U.S. 87, 92-96 (1993), in which the Court held that the guidelines permit an obstruction of justice enhancement, see U.S.S.G. § 3C1.1, for perjury at trial, is not one of these cases. Dunnigan concerned primarily a question of guidelines construction, and so it is not irreconcilable with any reading of Blakely. However, it is worth noting that Dunnigan conflicts with Blakely in one respect. Justice O'Connor expressed concern in her Blakely dissent that extension of Apprendi to determinate sentencing systems would render such systems unworkable, in part because some facts--such as perjury at trial--cannot be discovered in time to be included in the indictment. See Blakely, 124 S. Ct. at 2546 (O'Connor, J., dissenting). The majority disparaged this concern, stating, "Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt (as it has been for centuries), is unclear." Id. at 2539 n.11 (citation omitted). But, the Court had already answered that question in Dunnigan:

> [T]he enhancement is more than a mere surrogate for a perjury prosecution. It furthers legitimate sentencing goals relating to the principal crime, including the goals of retribution and incapacitation. It is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process.

Dunnigan, 507 U.S. at 97 (citations omitted).

Congress' establishment of the Sentencing Commission did not violate separation of powers principles, see id. at 380-411. Of particular relevance here, the Court noted that

> Although the Guidelines are intended to have substantive effects on public behavior . . . , they do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime. They do no more than fetter the discretion of sentencing judges to do what they have done for generations--impose sentences within the broad limits established by Congress.

Id. at 396 (emphasis added). Mistretta thus makes clear that the guidelines do collectively what federal district judges previously did individually--select a sentence within the range of penalties specified by Congress. See Kinter, 235 F.3d at 201 ("[T]he Commission's act of establishing sentencing ranges in the Guidelines is categorically different from the legislative act of setting a maximum penalty in a substantive criminal statute.").

In short, the Mistretta Court rejected a constitutional challenge to the guidelines on the basis that the Sentencing Commission performs not a legislative function, but a judicial one. Application of Blakely to the guidelines, however, necessarily would require a conclusion that the Sentencing Commission performs not a judicial function, but a legislative one. This is so because Blakely applies to the guidelines only if the Blakely Court redefined the term "statutory maximum" to include any fact that increases a defendant's potential sentence--regardless of its status as a statute or regulation and regardless of its provenance. Under such a definition of "statutory maximum," the

Commission performs a legislative function in contravention of Mistretta.[18]

A similar problem appears when we consider other Supreme Court decisions addressing the guidelines. One such case is Edwards v. United States, 523 U.S. 511 (1998). The Edwards defendants were charged with a drug-trafficking conspiracy involving cocaine and cocaine base ("crack"). See id. at 512-13. The district court instructed the jury that it must find that the defendants' conduct involved crack or cocaine, and the jury returned a general verdict of guilty. See id. at 513. The court then determined that the defendants' relevant conduct involved both forms of cocaine and premised its guidelines computations on this finding. See id. A unanimous Supreme Court upheld these computations, noting that "[t]he Sentencing Guidelines instruct the judge in a case like this one to determine both the amount and the kind of controlled substances for which a defendant should be held accountable." Id. at 513-14 (internal quotation marks omitted).

The Court rejected the defendants' claim that the district court was required by the Constitution or the relevant statute to presume that the jury found that the conspiracy involved only cocaine, reasoning that such a presumption would have little effect because the district court would still be required to impose a sentence based on all relevant conduct, including conduct found by the judge but not the jury. See id. at 514. The Court added, "[P]etitioners' statutory and constitutional claims would make a difference if it were

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[18] In this vein, we note that Congress certainly did not view the function of the Sentencing Commission as a legislative one. The legislative history of the Sentencing Reform Act is clear that the function of the guidelines is to channel judicial discretion within the range of statutory penalties established by Congress. See, e.g., S. Rep. No. 98-225, at 51 (1983) ("The definition of maximum prison terms [under the Sentencing Reform Act] does not alter existing statutory maximums: the existing Federal statutes still determine the maximum terms of imprisonment."), reprinted in 1984 U.S.C.C.A.N. 3182, 3234.

possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy." Id. at 515. This was not the case, however, because "the sentences imposed ... were within the statutory limits applicable to a cocaine-only conspiracy." Id.

In short, the Court concluded in Edwards that the district court was required by the guidelines to go beyond the "facts found by the jury" and determine for itself the type and quantity of drugs involved in the offense, and it rejected any possible constitutional challenge to this scheme precisely because the sentence imposed--based, as it was, on judicial findings of fact--was not more than the legislatively prescribed statutory maximum authorized by the finding of guilt by the jury. Edwards is entirely consistent with the rule adopted in Apprendi, which requires a jury finding for facts that establish the maximum potential statutory penalty. See Apprendi, 530 U.S. at 487 n.13 (explaining that Apprendi rule applies to "the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict"). Edwards is also consistent with our understanding of Blakely, i.e., that in Blakely the Court simply applied the rule of Apprendi to a new set of facts. If one understands Blakely as having broadened the definition of "statutory maximum," however, Edwards is no more. Under a supposed Blakely "redefinition" of statutory maximum, the Court could not have brushed aside the constitutional question presented in Edwards simply by stating that the findings made by the district court did not cause the sentence to exceed "the maximum that the statutes permit for a cocaine-only conspiracy." Edwards, 523 U.S. at 515. To the contrary, under the asserted Blakely redefinition of "statutory maximum," the Edwards Court would have faced a substantial constitutional question because the findings made by the district court regarding drug type and quantity would have increased the statutory maximum, thereby creating a right to jury findings on those questions.

We must also be mindful of the effect of an incorrect reading of Blakelv on United States v. Watts, 519 U.S. 148 (1997) (per curiam). In Watts, the Supreme Court thought it so obvious that judges could consider acquitted conduct in sentencing a defendant under the guidelines, see id. at 157, that the case was decided without oral argument despite Watts' claim that such a rule posed constitutional problems under the Double Jeopardy Clause, the Due Process Clause, and the Sixth Amendment, see Respondent Watts' Brief in Opposition, United States v. Watts, 519 U.S. 148 (1997) (No. 95-1906), 1996 WL 33413758, at *9-*13.

The sentence challenged in Watts was based in part on acquitted conduct, i.e., factual allegations that the jury determined had not been proven beyond a reasonable doubt. The Court nevertheless upheld this sentence, noting the lower standard of proof applicable to sentencing proceedings and reiterating its previous holding that "application of the preponderance standard at sentencing generally satisfies due process." Watts, 519 U.S. at 156 (citing McMillan v. Pennsylvania, 477 U.S. 79 (1986)). If Blakelv redefined the term "statutory maximum," however, consideration of acquitted conduct in establishing the guideline range would violate the Due Process Clause precisely because of the lower standard of proof.

In summary, we conclude that the fundamental question under Apprendi and Blakelv is not simply whether judicial fact finding increases a defendant's sentence relative to the sentence that would otherwise be imposed. Such a reading of these cases fails to take into account the context in which they were decided--a context which included the prior statements of the Supreme Court regarding the federal sentencing guidelines and Congress' intent in enacting the Sentencing Reform Act—and thus misapprehends the rule they impose. In fact, the pertinent question is whether a judicial factual finding has increased the defendant's sentence beyond what the legislature has authorized as the

consequence of a conviction or guilty plea. There is thus a very real difference between federal statutes (which define crimes and set forth statutory penalty ranges, a legislative function) and the federal sentencing guidelines (which channel judicial discretion in selecting a penalty within the range authorized by Congress, a judicial function). We therefore conclude that Blakely, like Apprendi before it, does not affect the operation of the federal sentencing guidelines.

C. Instructions to the District Courts

We previously instructed district courts within the Fourth Circuit to continue sentencing defendants in accordance with the guidelines, as was the practice before Blakely. See Hammoud, 2004 WL 1730309, at *1. We further recommended that those courts announce, at the time of sentencing, a sentence pursuant to 18 U.S.C.A. § 3553(a) (West 2000 & Supp. 2004), treating the guidelines as advisory only.

We believe that announcing--not imposing--a non-guidelines sentence at the time of sentencing will serve judicial economy in the event that the Supreme Court concludes that Blakely significantly impacts guidelines sentencing.[19] The announcement of a non-guidelines sentence may require the district court to consider issues not generally pertinent in guidelines sentencing, thereby

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[19] At least one district court within our jurisdiction has indicated confusion about our recommendation. See United States v. Johnson, No. 6:04-00042, slip op. at 2-3 (S.D. W. Va. Aug. 13, 2004) . We emphasize that our recommendation is not intended to import uncertainty into the sentencing process through the imposition of multiple sentences. Under our prior order, district courts must impose a guidelines sentence which, absent a contrary direction from the Supreme Court, the defendant will serve. However, we cannot ignore the possibility that the Supreme Court will apply Blakely to the guidelines, and for the reasons stated in the text of this opinion, we believe it will serve the interests of judicial economy for a non-guidelines sentence to be determined at the time of the sentencing hearing.

requiring the investment of additional time at the sentencing hearing. If the Supreme Court does not apply Blakely to the guidelines, this will be wasted effort. If the Court does apply Blakely to the guidelines, however, the district court and the parties will have made at least substantial progress toward the determination of a non-guidelines sentence, at a time when the facts and circumstances were clearly in mind. While a new hearing may have to be convened in order to impose the previously determined and announced non-guidelines sentence, we anticipate that the district court and the parties will need to spend far less time preparing because the issues will already have been resolved. We therefore continue to recommend that district courts within the Fourth Circuit announce, at the time of imposing a guidelines sentence, a sentence pursuant to 18 U.S.C.A. § 3553 (a), treating the guidelines as advisory only.

VIII. Sentencing Issues

Having determined that Blakely does not affect Hammoud's sentence, we now consider the remainder of his challenges to his sentence. Hammoud challenges several rulings made by the district court during sentencing. The most significant of these claims concerns the application of the terrorism enhancement, see U.S.S.G. § 3A1.4. Hammoud's remaining sentencing claims may be disposed of more briefly.

A. Terrorism Enhancement

Section 3A1.4 applies "[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism." The term "federal crime of terrorism" is defined as commission of an enumerated felony—including providing material support to a designated FTO in violation of 18 U.S.C.A. § 2339B— that "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." 18

U.S.C.A. § 2332b(g) (5) (West 2000 & Supp. 2004); see U.S.S.G. § 3A1.4, comment, (n.l).

1. Standard of Proof

Hammoud argues that the preponderance standard that generally governs in sentencing proceedings should not apply here because § 3A1.4 is "a tail which wags the dog of the substantive offense," McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986), and therefore must be proved at least by clear and convincing evidence. Because Hammoud did not raise this claim in the district court (he instead asserted that the facts underlying the enhancement had to be found by a jury beyond a reasonable doubt under Apprendi), we review for plain error. As noted previously, the plain error standard requires Hammoud to demonstrate that there was error that was plain and affected his substantial rights; we must then determine that the exercise of our discretion to correct the error is necessary to protect the integrity of judicial proceedings. For the reasons set forth below, we conclude that any error was not plain.

In McMillan, the Supreme Court noted that due process is generally satisfied when sentencing factors are proved by a preponderance of the evidence; the Court rejected a claim that a factor requiring imposition of a mandatory minimum sentence should be subject to a higher standard of proof. See id. at 91-92. In reaching this conclusion, the court noted that the statutory mandatory minimum at issue there--for visible possession of a firearm--"operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession" and that "[t]he statute gives no impression of having been tailoredto permit the visible possession finding to be a tail which wags the dog of the substantive offense." Id. at 88.

While this court has taken the language of McMillan as an indication that the Due Process Clause imposes some

limitations on the use of sentencing factors proven only by a preponderance of the evidence, we have never defined those limits and have never declared a sentence invalid on the basis that a sentencing factor was established by an inadequate standard of proof. See, e.g.. United States v. Montgomery, 262 F.3d 233, 249-50 (4th Cir. 2001) (stating that "[p]roof by a preponderance of evidence is sufficient as long as the enhancement is not a tail that wags the dog of the substantive offense"; not deciding whether the district court was required to apply a heightened standard, as it had made the relevant finding by clear and convincing evidence "[i]n an abundance of caution" (internal quotation marks omitted)); United States v. Fenner, 147 F.3d 360, 366-67 (4th Cir. 1998) (stating that "sometimes the prosecution must bear the burden of proving beyond a reasonable doubt facts bearing upon sentencing" but noting that such circumstances had not been defined).

The Sixth Circuit has held—in a case involving the § 3A1.4 enhancement--that it is never necessary to apply a heightened standard of proof to a sentencing factor. See United States v. Graham, 275 F.3d 490, 517 n.19 (6th Cir. 2001). The court reasoned that

> The McMillan Court's apparent concern was not whether the sentencing factor's effect on the ultimate sentence was significant, but whether it was appropriately characterized as guiding the court's discretion in punishing the defendant for the crime for which he was convicted. As long as a sentencing factor does not alter the statutory range of penalties faced by the defendant for the crime of which he was convicted, McMillan permits the factor to be found by preponderance of the evidence.

Id. In contrast, the Ninth Circuit has imposed a heightened standard of proof in a number of cases. See, e.g.. United States v. Jordan, 256 F.3d 922, 927-28 (9th Cir. 2001) (noting

that court has applied heightened standard of proof for seven-level and nine-level enhancements and articulating "totality of the circumstances" test for determining whether heightened standard should apply (internal quotation marks omitted)). And, the Third Circuit has required application of the clear and convincing standard to factual findings underlying an upward departure that increased the defendant's sentence from 30 months to 30 years. See United States v. Kikumura, 918 F.2d 1084, 1100-1102 (3d Cir. 1990).

In the absence of a binding decision from this court or the Supreme Court, and in view of the conflicting views of the other circuits, we conclude that any error in the standard of proof applied by the district court was not plain. See United States v. Neal, 101 F.3d 993, 998 (4th Cir. 1996).

2. Application of the Enhancement

Hammoud raises two additional arguments regarding the terrorism enhancement. First, Hammoud contends that the district court should have applied U.S.S.G. § 2M5.3--the guideline specifically applicable to violations of § 2339B--rather than § 3A1.4. Even assuming that the district court should have applied § 2M5.3,[20] there was no error.

Setting § 2M5.3 aside for the moment, it is clear that the terrorism enhancement may be imposed on a defendant who has been convicted of providing material support to a designated FTO. Section 3A1.4 applies "[i]f the offense is a felony that involved ... a federal crime of terrorism." Id. §

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[20] Section 2M5.3 first appeared in the 2002 Guidelines Manual, after Hammoud committed his violations of § 2339B (which were completed in 2000) . Because application of § 2M5.3 would have resulted in a higher base offense level, the district court arguably should have applied the 2000 version of the Guidelines Manual. See U.S.S.G. § 1B1.11 (b) (1); Elliott v. United States, 332 F.3d 753, 767 n.12 (4th Cir. 2003).

We note that the PSR indicates that the 2002 manual was applied. Hammoud does not challenge the application of the 2002 guidelines manual.

3A1.4(a). As the Sixth Circuit has noted, "[t]he word 'involved' occurs frequently throughout the Guidelines, both in the substantive provisions and in the commentary, and is typically employed to mean 'included.'" Graham, 275 F.3d at 516. We therefore think it is reasonable to understand § 3A1.4 as applying to a circumstance such as this one, in which one of the counts of conviction is alleged to be a federal crime of terrorism. See id. (concluding that § 3A1.4 applies when the defendant has committed a federal crime of terrorism). Violation of § 2339B is one of the crimes enumerated in the definition of "federal crime of terrorism." Therefore—still setting § 2M5.3 aside momentarily--a defendant who has been convicted of providing material support to an FTO may be subject to the enhancement if the evidence establishes that he provided such support with the intent to influence or coerce government conduct.

Having determined that the terrorism enhancement would apply to Hammoud if § 2M5.3 did not exist, we now turn to the question of whether the existence of § 2M5.3 changes our analysis. We conclude that it does not. As best we can discern from his rather conclusory argument, Hammoud's concern is that application of both § 2M5.3 and § 3A1.4 would constitute double counting, and therefore a district court could apply one or the other, but not both. We disagree.

Double counting under the guidelines occurs "when a provision of the Guidelines is applied to increase punishment on the basis of a consideration that has been accounted for by application of another Guideline provision." United States v. Reevey, 364 F.3d 151, 158 (4th Cir. 2004). Double counting is permissible unless the guidelines expressly prohibit it in a given circumstance. See id. Thus, "[a]n adjustment that clearly applies to the conduct of an offense must be imposed unless the Guidelines expressly exclude its applicability." United States v. Williams, 954 F.2d 204, 207 (4th Cir. 1992). Nothing in either

§ 2M5.3 or in § 3A1.4 prohibits the application of both provisions. Hammoud's double counting claim therefore fails.

Hammoud also maintains that the evidence does not support application of the terrorism enhancement. We disagree. The evidence presented at trial established that Hammoud had close connections with Hizballah officials, including its spiritual leader and a senior military commander. Other evidence--including Hammoud's own testimony--indicated that Hammoud was well aware of Hizballah's terrorist activities and goals and that he personally supported this aspect of Hizballah. In short, the evidence presented at trial was sufficient to establish that Hammoud provided material support to Hizballah with the intent to influence or coerce government conduct.

B. Sophisticated Money Laundering

The money laundering guideline provides for a two-level enhancement if the defendant is convicted of violating 18 U.S.C.A. § 1956 and "the offense involved sophisticated money laundering." U.S.S.G. § 2S1.1(b)(3). The commentary provides that "^sophisticated laundering' means complex or intricate offense conduct pertaining to the execution or concealment" of the offense, and "typically involves the use of" fictitious entities, shell corporations, "layering" of transactions, or offshore accounts. Id. § 2S1.1, comment. (n.5(A)).

Here, the district court found that Hammoud and his coconspirators employed fictitious entities and shell corporations in the course of laundering the proceeds from the cigarette smuggling operation. This finding is not clearly erroneous, and therefore the enhancement was properly applied.

C. Obstruction of Justice

Finally, Hammoud challenges application of an enhancement for obstruction of justice, see U.S.S.G. § 3C1.1, that was based upon his testimony at trial. An obstruction of justice enhancement based on perjured trial testimony is proper when "the defendant . . . (1) gave false testimony; (2) concerning a material matter; (3) with the willful intent to deceive (rather than as a result of confusion, mistake, or faulty memory)." United States v. Quinn, 359 F.3d 666, 681 (4th Cir. 2004) (internal quotation marks omitted). Here, count 78 charged Hammoud with giving $3,500 to Hizballah; as part of its case, the Government introduced into evidence the receipt for this donation. Hammoud, however, denied ever having donated any money to Hizballah. Under these circumstances, application of the enhancement was not clear error.

IX. Conclusion

For the reasons set forth above, we reject each of Hammoud's challenges to his convictions and sentence. We therefore affirm the judgment of the district court in its entirety.

AFFIRMED

WILKINSON, Circuit Judge, concurring:

The United States Sentencing Guidelines are constitutional. To invalidate the Guidelines as presently applied, the federal judiciary would have to seize a sizable chunk of legislative territory. While I acknowledge the view that invalidation of the Guidelines would mark a great democratic development, I regard their evisceration as an unwarranted accretion of power by the federal courts.

The great drawback of applying Blakely v. Washington, 124 S. Ct. 2531 (2004), to the Sentencing Guidelines is that in

doing so the federal courts would perform a legislative function. It is and always has been the prerogative of the legislature to define the elements of a criminal offense. In denominating those sentencing factors which must now be treated as elements and found by a jury, the courts arrogate to themselves the most basic of legislative tasks. I do not think the judiciary can legislate the elements of a criminal offense without bending the Constitution beyond recognizable shape.

An element of a crime must be found by a jury as a precondition to guilt. It is what a jury must establish in order to convict a defendant of the charged offense. Sentencing factors are not elements. When a fact is not necessary for conviction of an offense -- an offense passed into law by Congress -- that fact becomes a "factor" because it cannot by definition be an "element." If the judiciary is now to announce that sentencing factors must be found as elements beyond a reasonable doubt, that badly skews the balance that Congress has historically been able to strike between guilt and punishment.

Of course, it will be said that if Blakely extends to the Guidelines, the judiciary is not in reality creating elements of new offenses, and juries in reality are simply finding facts as they have always done. This, however, ignores the substance of what is taking place. When a jury is required to find a fact beyond a reasonable doubt, it is fulfilling precisely the same function that the legislature historically has mandated for it in determining the guilt of a legislatively prescribed offense. And when the judiciary requires juries to do that which the legislature has historically had exclusive power to direct them to do, judges have assumed the lawmaker's role.

Pretending otherwise would draw us into a constitutional dilemma. If what the Supreme Court and

Courts of Appeals have always understood to be factors are now understood to be elements, our problems are larger than we realize. Mistretta held that the Guidelines "do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime. They do no more than fetter the discretion of sentencing judges to do what they have done for generations -- impose sentences within the broad limits established by Congress." Mistretta v. United States, 488 U.S. 361, 396 (1989).

If, all along, the Sentencing Commission, in contravention of Mistretta, was actually creating elements, then it was also creating dozens and hundreds of new offenses. If the judiciary suddenly can say that juries must find all the facts that attach to these offenses, then judges have assigned themselves the enterprise of creating and defining crimes. But creating elements and defining offenses is a purely legislative power; offenses created within the judicial branch are void because they were not authorized by the law-making procedure our Constitution allows, that of Article I, Section 7. Installing judges, not Congress, as arbiters of the necessary elements of any given offense is hardly what the Sixth Amendment and the nature of our democracy allow, let alone demand.

Some may argue that separation of powers is not implicated because the power to create elements is a delegable function. I disagree. The power of legislatures to define crimes and to set ranges of punishment is no small thing. Criminal law is the basic bulwark of public safety in our country, and it makes sense that the formulation of offenses would be left in turn to the people's representatives. To apply Blakely to the Guidelines essentially severs the connection between public protection and popular governance. Put plainly, it erodes the

legislature's constitutional prerogative to pass criminal laws to protect the American people.

Since Blakely, the air has been filled with anticipation of the invalidation of the Guidelines. There has been no shortage of suggestions for legislative "fixes" whereby Congress might reclaim its authority to define crimes and set parameters of punishment. Whether those new sentencing regimes would be more opaque or draconian than the present system is unclear. Whether any new regime would pass constitutional muster is itself uncertain. At a minimum, it will take more months of confusion and years of litigation to find out. The hard truth is that none of us can envision the future or forecast the shape of a post-Guidelines world.

We live, however, in a constitutional present. Congress has proclaimed, in the United States Code, what the elements of a crime are. It has instructed the courts to ensure through the Guidelines that the exercise of sentencing discretion is evenhanded, fair, non-discriminatory, and predictable. See Sentencing Reform Act of 1984, 28 U.S.C. § 991(b)(l)(B) (2000). What Congress -- the most democratic of the branches -- did not do was authorize the bench to create additional elements on its own. Nor could it, as Mistretta teaches. Yet some now maintain that the democratic features of jury deliberation require judges to start legislating and to push Congress aside.

I think such a result antithetical to our democracy, regardless of how it is spun. Contrary to the dissent's representations, I do not in any sense argue that Apprendi "got it wrong." Post at __ n.4. To the contrary, I argue that invalidation of the Guidelines is in no sense required by Supreme Court precedent. Apprendi v. New Jersey, 530 U.S. 466 (2000), Ring v. Arizona, 536 U.S. 584 (2002), and most recently Blakely, have not required the courts to legislate

from the bench.* In each case, the Court held that any fact which increases a statutory maximum must be found by a

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* My good colleague in dissent says that "[t]he SupremeCourt has spoken." Post at __. More specifically, she argues that the question of whether courts are impermissibly creating legislative offense elements is foreclosed. To the contrary, this issue is at the center of the entire Guidelines debate.

First, if the issue were foreclosed, why did the Supreme Court in Blakely take the trouble to state explicitly that its holding did not extend to the Guidelines? See Blakely, 124 S. Ct. at 2538 n.9. The Court will not reach out to decide unpresented questions, but neither will it purposefully sow confusion by expressing agnosticism about a proposition not in doubt. Second, if the ability of courts to create offense elements is so plain, why has the Court not overruled Edwards v. United States, 523 U.S. 511 (1998); United States v. Watts, 519 U.S. 148 (1997) (per curiam); Witte v. United States, 515 U.S. 389 (1995); or Stinson v. United States, 508 U.S. 36 (1993)? In each case it allowed judges to find sentencing enhancements under the preponderance standard. Third, if the issue is foreclosed, why was the linchpin of the argument in Apprendi, Ring, and Blakely tied to the question of whether a fact caused a sentence to exceed the statutory maximum -- an inquiry which by its nature respects the division of legislative and judicial authority? Finally, if this fundamental argument is so foreclosed, one is left to wonder how nine members of this court, unanimous panels of the Fifth and Eleventh Circuits, and the en bane Sixth Circuit, have found the Sentencing Guidelines constitutional in light of Blakely. See United States v. Reese, 2004 WL 1946076 (11th Cir. Sept. 2, 2004); United States v. Koch, 2004 WL 1899930 (6th Cir. Aug. 26, 2004) (en bane); United States v. Pineiro, 377 F.3d 464 (5th Cir. 2004). And if "controlling precedent" is so clear that failure to see it is "surprising," how much more surprising it must be that the Second Circuit, unanimously and en bane, certified the question to the Supreme Court, for the first time since 1981, because this was not an issue where "doctrinal uncertainty may be tolerated." United States v. Penaranda, 375 F.3d 238, 245 (2d. Cir. 2004) (en bane) . If the question of whether Blakelv requires us to treat factors and elements the same was so clear, why has the Supreme Court expedited cases for argument on the first day of its Term to answer it?

I do, however, appreciate that my colleague accepts my central critique of applying Blakely to the Guidelines -- namely that to do so is to convert factors into elements. See post at ___ n.4 ("treating ^sentencing factors' that mandate enhancement of a sentence as ^elements' is exactly what" precedent requires). My colleague neglects to mention any reason why such a course is justifiable.

jury. In each case, the Court keyed the analysis to the statutory maximum, thus operating explicitly within the framework that the legislature had imposed. But if any facts that increase a sentence without reference or regard to the statutory parameters must be found by a jury, then legislatures are no longer the creators of criminal law and judges no longer the instruments of guided sentencing discretion. The Apprendi line of cases sought to prevent judges from assuming the legislative prerogative; Hammoud now asks judges to assume that very same prerogative. To accept his invitation is to trample on the democratic foundations of our constitutional order.

Sixth Amendment rights are precious. Hammoud's were fully protected -- a jury of his peers convicted him of no fewer than fourteen statutory offenses. But the particular Sixth Amendment right pressed after Blakely is novel and evolving; the democratic liberties at risk are ancient ones. The assignment to juries of all factual findings that may affect a sentence will doubtless be advertised as a great democratic development. In my judgment, it is profoundly anti-democratic because the least accountable branch has claimed for itself a power historically entrusted to the people's representatives. Because the opinion for the court refuses to assume powers that cannot be assumed, I am pleased to concur.

Whether the Sixth Amendment requires juries to find most sentence enhancing facts is integrally tied to the question of whether our constitutional structure reserves to legislatures alone the power to criminalize behavior. Indeed, the Sixth Amendment issue cannot be resolved without asking whether the creation of non-legislative elements commandeers the core constitutional function of a coordinate branch. Such judicial alchemy -- converting legislative into judicial power -- is not justifiable. Creating elements is what legislatures, and only legislatures, can do.

SHEDD, Circuit Judge, concurring:

I fully concur in Parts I-VI and VIII of the majority opinion. Concerning Part VII, the majority correctly frames the issue before us as "whether the rationale of Blakely (and Apprendi before it) requires indictment and a jury finding, beyond a reasonable doubt, of facts that result in an increase in the offense level and corresponding guideline range." Ante at 48. Blakely and Apprendi, of course, do not involve the constitutionality of the guidelines. As the majority points out, however, the Supreme Court has spoken on the constitutionality of the guidelines in differing contexts on several occasions, and it has consistently upheld the guidelines. Although "this line of authority by itself suggests that a lower court should be skeptical about concluding that Blakely's invalidation of a state-sentencing scheme suddenly dooms" the guidelines, United States v. Koch, __ F.3d __, 2004 Westlaw 1899930, at *3 (6th Cir. Aug. 26, 2004) (en bane) , we would certainly be at liberty to apply the rationale of Blakely and Apprendi to the guidelines unless one of the Court's guidelines cases directly controls the issue presented to us.

I believe Edwards v. United States, 523 U.S. 511 (1998), is that case. In Edwards, the Supreme Court was presented with, and necessarily rejected, a Sixth Amendment (among other issues) challenge to a sentencing enhancement based on judge-made factual findings. See Koch, 2004 Westlaw at **3-4; United States v. Booker, 375 F.3d 508, 516-17 (7th Cir.) (Easterbrook, J., dissenting), cert. granted, 73 U.S.L.W. 3073 (U.S. Aug. 2, 2004). As the Sixth Circuit noted, Edwards "gave the back of the hand to the kind of challenge raised here." Koch, at *3. Although Edwards predates Apprendi and Blakely, the Court gave no indication in either of those cases that Edwards is no longer valid. Indeed, the Court in Apprendi explicitly reaffirmed Edwards. See Apprendi, 530 U.S. at 497 n.21 ("The Guidelines are, of course, not before

the Court. We therefore express no view on the subject beyond what this Court has already held. See, e.g., Edwards v. United States").*

In my opinion, because Edwards is controlling, the reasoning of Blakely, at most, creates a conflict with Edwards that may only be resolved by the Supreme Court. See Koch, at *4 ("The Court . . . has not given us the authority to ignore Edwards"); Booker, 375 F.3d at 517 (Easterbrook, J. dissenting) ("It is for [the Court], not us, to say that as a result of Blakely' Edwards is no longer valid). Under these circumstances, our role as a court of appeals is simply to apply Edwards, and Edwards compels the conclusion that Hammoud's argument must fail. It is unnecessary for us to go further. For this reason, I concur in the result reached by the majority in Part VII.

WIDENER, Circuit Judge, concurring and dissenting:

I concur in the result and in all of the opinion of the court except Part VII C, which commences on page 68 of the circulated slip opinion.

I respectfully dissent to our recommending, in Part VII C, that the district courts "announce, at the time of sentencing, a sentence pursuant to ... [18 U.S.C. § 3553 (a),] treating the Guidelines as advisory only."

This extraordinary recommendation from an intermediate to a more inferior federal court will doubtless

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* Regardless of whether the United States shares my view of Edwards, I believe that a close reading of that case compels the conclusion that it is controlling. I note that the United States Sentencing Commission, as amicus curiae in the Booker and Fanfan cases now pending before the Supreme Court, recognizes the import of Edwards. See Brief of United States Sentencing Commission at 25-26, United States v. Booker (No. 04-104) ("To conclude that factfinding under the guidelines violates the Sixth Amendment, the Court would have to ... overrule or substantially limit Edwards").

be treated as a direction by many, even if not all, of the district courts in this circuit.

As a practical matter, if the advisory-only sentence is lower than the Guidelines sentence, an appeal will be guaranteed.

More importantly, such an extraordinary variance as we recommend from the usual rules of criminal procedure can only indicate to others a doubt, which should not exist, as to the outcome of the principal question in this case, the effect, if any, of Blakely on Guidelines sentencing. Blakely should not, and does not, have an effect on our Guidelines sentencing. And, even if the recommended advisory sentencing is discretionary, about which I have some doubt, in my opinion, it is inadvisable.

DIANA GRIBBON MOTZ, Circuit Judge, dissenting:

The Supreme Court has spoken: When a sentencing "system" permits a "judge [to] inflict[] punishment that the jury's verdict alone does not allow" it violates a defendant's Sixth Amendment right to trial by jury. Blakely v. Washington, 124 S.Ct. 2531, 2537, 2540 (2004) . In this case, the United States Sentencing Guidelines permitted the district judge to inflict punishment on Mohammed Y. Hammoud thirty times greater than that allowed by the jury verdict alone. Blakely makes clear that such a sentence violates the Sixth Amendment; the majority can reach a contrary conclusion only by resolutely refusing to follow Blakely. Accordingly, although I join the majority in affirming Hammoud's convictions, I cannot join in its affirmance of this unconstitutional sentence.

I.

The maximum sentence that the district judge could have imposed in this case, had he not made any additional

factual findings, was 57 months.[1] The United States Sentencing Guidelines (the "Guidelines" or "federal guidelines"), however, directed the judge to make additional findings. The Guidelines further required the judge to increase Hammoud's sentence if the judge resolved, by a preponderance of the evidence, certain facts in favor of the Government. Obedient to the Guidelines, the judge made findings with respect to numerous facts that had never been considered by the jury or proved beyond a reasonable doubt. On the basis of these findings, the district judge sentenced Hammoud not to 57 months, but to 155 years.

Some of these judicial findings had nothing to do with the jury's verdict. For example, the jury never considered the issue of whether Hammoud had obstructed justice; in fact, none of the charges against him related in any way to obstruction. Yet the district court increased Hammoud's offense level (which with his criminal history category dictated his sentence range, see U.S. Sentencing Guidelines Manual (hereinafter "U.S.S.G."), Tbl. Ch. 5, Pt. A) because it found that he had done so. This required the court to make findings with respect to three facts never even presented to the jury: that Hammoud "when testifying under oath (1) gave false testimony; (2) concerning a material matter; (3) with the willful intent to deceive (rather than as a result of confusion, mistake, or faulty memory) ." United States v. Jones, 308 F.3d 425, 428 n.2 (4th Cir. 2002) (citing United States v. Dunnigan, 507 U.S. 87, 92-98 (1993)).

Other judicial findings, also mandated by the Guidelines, although at least relating to the facts found by

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[1] The Government expressly so concedes, explaining that "stripped of any judge-found enhancing facts Hammoud face[d] a guidelines sentencing range of 46-57 months" because "using the proper Guidelines Manual (the 1998-99 edition), if all counts of conviction are grouped together, the money laundering Guideline § 2S1.1 provides the greatest offense level--23" and "[c]oupled with a Criminal History Category I, a level 23 yields a 46-57 month range." Supplemental Brief of the United States at 34 n.19, amended by Letter of July 28, 2004.

the jury, required the district judge to increase Hammoud's sentence to an extraordinary degree beyond that permitted by the jury verdict alone. For example, the jury convicted Hammoud of three counts, each involving illegal cigarette trafficking of at least 60,000 cigarettes, which correlates to a tax loss of roughly $6,700. See 18 U.S.C. § 2341, 2342 (2000). The Guidelines, however, required the judge to determine by a preponderance of the evidence "the total tax loss attributable to the offense" looking to "all conduct violating the tax laws . . . unless . . . clearly unrelated." U.S.S.G. § 2T1.1, cmt. n.2. When the judge concluded that Hammoud had trafficked in many more cigarettes than his conviction reflected, resulting in a tax loss of over $2,500,000, the Guidelines required the judge to increase Hammoud's offense level by fourteen levels. See U.S.S.G. § 2E4.1, § 2T4.1.

Similarly, the jury found only that Hammoud knowingly provided material support to a foreign terrorist organization, 18 U.S.C. § 2339B(a) (1) (2000 & Supp. I); the jury never considered whether in doing so Hammoud also acted with the specific intent to "influence the conduct of government." 18 U.S.C.A. § 2332b(g)(5) (West 2000 & Supp. 2004) . Yet, the Guidelines required the district judge to determine whether Hammoud acted with this specific intent; and when the judge concluded by a preponderance of evidence that Hammoud had, the Guidelines required the judge to increase Hammoud's offense level by twelve levels and to set his criminal history category at VI. U.S.S.G. § 3A1.4.

Together, the judge's tax-loss and terrorism findings burdened Hammoud with an offense level and criminal history category so high that the Guidelines instructed the district judge to impose a life sentence. See U.S.S.G., Tbl. Ch. 5, Pt. A. In accord with United States v. Kinter, 235 F.3d 192, 199-200 (4th Cir. 2000), the district judge "reduced" Hammoud's sentence from the Guidelines range of life to "only" 155 years -- the total maximum sentence authorized

under the statutes governing the offenses for which Hammoud was convicted.

Of course, the district judge cannot be faulted. In sentencing Hammoud, the judge simply followed the Guidelines and our holding that Guidelines-mandated sentence increases, contingent on judicial findings, survived the rule established in Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, the Supreme Court held that the Sixth Amendment requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Soon thereafter, we held in Kinter that, without violating the Apprendi mandate, a judge may follow the Guidelines and make factual findings that increase the maximum sentence permitted by the jury verdict alone under the Guidelines, provided the ultimate sentence does not exceed the maximum allowed in the statute "criminalizing the offense." Kinter, 235 F.3d at 200. The district court precisely followed this instruction.

A few months ago, however, the Supreme Court decided Blakely. There the Court expressly rejected the Kinter view that the "statutory maximum," which could not be exceeded without violating Apprendi, was the sentence authorized by the statute "criminalizing the offense." The Court instead held: "[0]ur precedents make clear . . . that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 124 S. Ct. at 2537 (emphasis in original) (citing Ring v. Arizona, 536 U.S. 584, 602 (2003); Harris v. United States, 536 U.S. 545, 563 (2002) (plurality opinion); and Apprendi, 530 U.S. at 488). Blakely instructs that the Sixth Amendment does not permit a "judge [to] inflict[] punishment that the jury's verdict alone does not allow." 124

S. Ct. at 2537.[2] Moreover, in Blakely, the Supreme Court held that a jury's verdict alone does not allow the imposition of the highest sentence permitted under the statute criminalizing the offense when separate sentencing guidelines mandate a lesser maximum sentence. Id. at 2537-38.

Thus, the Supreme Court's decision in Blakely "make[s] clear," 124 S.Ct. at 2537, that in Kinter we misinterpreted the term "statutory maximum" as used in Apprendi, and that the findings made by the district judge pursuant to the Guidelines, which increased Hammoud's sentence beyond that permitted by "the jury verdict alone," violated the Sixth Amendment.

II.

The majority holds to the contrary by exempting the federal guidelines from the Blakely rule. In doing so, the majority acknowledges that, given the language of the Blakely holding, it is "not that far-fetched to conclude that the Court intended to encompass within its holding any situation in which a binding maximum -- whether statutory or not -- is increased by virtue of a judicial finding." Ante at 58-59. But, according to the majority, that constitutes an "incorrect reading of Blakely." Id. at 66. The majority maintains that Blakely must be "understood," see id. at 60, 61, 66, to hold only that the Sixth Amendment prevents judicial factfinding that increases a "defendant's sentence beyond what the legislature has authorized as the consequence of a conviction or guilty plea." Ante at 68 (emphasis in original). The majority's "understanding" of Blakely actually constitutes a complete misunderstanding of the case.

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[2] In Blakely, the judge-found facts increased the defendant's sentence by 70% -- from 53 to 90 months. Id. at 2540. Here, the judge-found facts increased Hammoud's sentence by more than 3000% -- from 57 to 1860 months.

A.

First, the majority's "understanding" conflicts with both the actual holding and rationale of Blakely. As an intermediate appellate court, we have no license to develop an "understanding" of Supreme Court precedent at odds with the Supreme Court's own language and reasoning. Rather, we must follow Blakely as written, not as we would like it to have been written or as we "understand" it to have been written.

As written, Blakely instructs:

> Our precedents make clear . . . that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.[3]

124 S. Ct. at 2537 (internal quotation marks and citations omitted). This language means exactly what it says: All defendants must be sentenced "solely on the basis of the

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[3] The majority characterizes this language – the Blakely holding – as the "culprit" that had led other courts to conclude that the Blakely rule applies to the federal guidelines. Ante at 58. The majority's word choice is odd – and revealing. A "culprit" is "one accused of ... a crime" or "fault" or "guilty of a crime" or "fault." Webster's Third New International Dictionary 552 (1993). By choosing to characterize this language as a "culprit," the majority clearly signals its distaste for the Blakely holding. The majority apparently has forgotten that dislike of, or disagreement with, a Supreme Court holding does not provide a lower court with a basis for refusing to follow the holding.

facts reflected in the jury verdict." Id. The Supreme Court's express directive leaves no room for the majority's "understanding" of Blakely.

Nor does the Court's rationale permit the approach adopted by the majority. The Blakely Court rejected the very argument the Government poses here — that although the sentence imposed on the defendant exceeded the Guidelines' "standard range" maximum (i.e., the maximum absent additional judicial findings), "there [wa]s no Apprendi violation" because the sentence did not exceed the maximum allowed in the statute criminalizing the offense. Id. at 2535-38. The Court held that "the ^statutory maximum' for Apprendi purposes" is the "standard range" maximum (i.e., 53 months) because that sentence -- not the maximum sentence authorized in the statute "criminalizing the offense," Kinter, 235 F.3d at 200 — is the highest sentence that a judge could impose "solely on the basis of the facts admitted in the guilty plea." Blakely, 124 S. Ct. at 2537. If the sentencing judge had imposed a sentence greater than 53 months without additional judicial fact-finding, "he would have been reversed." I_d. at 2538. Hence, Blakely had an enforceable "legal right to" application of the maximum standard range sentence — it was his maximum sentence for "Apprendi purposes." Id. at 2537, 2540 (emphasis in original).

This rationale compels the conclusion that Hammoud's standard range maximum sentence under the federal sentencing guidelines (rather than the sentence set forth in the statutes criminalizing his offenses) constitutes his maximum sentence for Apprendi purposes . Hammoud's standard range maximum Guidelines sentence was 57 months; as the Government concedes, that is the highest sentence the district court could have imposed on Hammoud solely on the basis of the facts reflected in the jury verdict. Hammoud, like Blakely, had an enforceable legal right to that standard range maximum. For, as in

Blakely, if the judge had imposed a sentence greater than this standard range maximum without additional judicial fact-findings, the judge "would have been reversed." 124 S. Ct. at 2538; see also, e.g., United States v. Savles, 296 F.3d 219, 227 (4th Cir. 2002); United States v. Pineiro, No. 03-30437, 2004 WL 1543170, at *6 (5th Cir. July 12, 2004) (conceding that "[l]ike the judge who disregards the Washington sentencing rules, a federal judge who disregards the Guidelines does so on pain of reversal"); Kinter, 235 F.3d at 200 (acknowledging that if the district court had "disregarded the maximum" Guideline standard range, "we would have been required to vacate" the sentence).

Thus, both the holding and rationale of Blakely mandate that any sentence that exceeds "the maximum sentence [the] judge [could] impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" violates the Sixth Amendment. Blakely, 124 S. Ct. at 2537. Hammoud's 155-year sentence clearly exceeds the 57-month maximum sentence the district judge could have imposed solely on the basis of the jury verdict; ergo, it is unconstitutional. The majority's contrary "understanding" of Blakely simply misreads the case.

B.

Moreover, this "understanding" rests on the most tenuous of foundations -- a single fact given no significance by the Supreme Court itself -- i.e., that the Blakely guidelines were entirely set forth in a statute and the federal guidelines are not. The majority elevates this lone fact, never relied on and barely mentioned by the Blakely Court, into the dispositive linchpin of the Court's analysis, maintaining that because of it, the Blakely rule does not apply to the federal guidelines. In doing so, the majority wishfully grabs at a straw, rather than engaging in the "close examination of

Blakely," which it acknowledges is the proper focus. Ante at 50.

"Close examination" of Blakely quickly reveals that the Supreme Court never relied on the majority's assertedly dispositive fact. The Blakely Court notes the statutory origin of the Washington state guidelines only once -- at the outset of its opinion when recounting the background of the case. Blakely, 124 S. Ct. at 2535. The remainder of the opinion, containing the Court's extended reasoning, never again refers to this fact, let alone suggests that it is determinative. See id. at 2536-43.

On the contrary, the Blakely Court vigorously, almost selfconsciously, rejects the very idea to which the majority clings: that importance attaches to whether or not a maximum sentence is set forth in a statute. The Court initially places the phrase "statutory maximum" in quotation marks -- indicating that the phrase constitutes a term of art, subject to special definition. Id. at 2537. The Court then proceeds to provide that definition, a definition that does not contain any reference to the origin (statutory or not) of the maximum sentence. Rather, under this definition, which the Court tells us its "precedents make clear," the "'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id.

Furthermore, time and again throughout its analysis, the Blakely Court employs language that reflects its total indifference to whether or not the "statutory maximum" for "Apprendi purposes" is actually embodied in a statute. See, e.g., id. at 2537 (referring to the "maximum [the judge] could have imposed under state law" when describing the facts in Ring and Apprendi) (emphasis added); id. at 2538 (observing that neither McMillan v. Pennsylvania, 477 U.S. 79 (1986), nor Williams v. New York, 337 U.S. 241 (1949), "involved a sentence greater than what state law

authorized") (emphasis added); id. (concluding that "[b]ecause the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid") (emphasis added); id. at 2540 (explaining how a sentencing "system" violates the Sixth Amendment) (emphasis added); id. at 2543 (noting that Blakely "was sentenced to prison for more than three years beyond what the law allowed") (emphasis added). The majority must ignore all of this language in order to hold that a single fact, regarded as inconsequential by the Blakely Court, constitutionally distinguishes that case from the one at hand.

This is precisely the sort of emphasis on "form" rather than "effect" that the Supreme Court has repeatedly held improper in determining the scope of Sixth Amendment jury-trial rights. See Ring, 536 U.S. at 602 ("[T]he dispositive question . . . "is one not of form, but of effect.'" (quoting Apprendi, 530 U.S. at 494). For, although the federal guidelines (promulgated as they are by an administrative agency) are not statutes, they are, as we recognized in Kinter itself, "nearly indistinguishable from congressionally enacted criminal statutes." 235 F.3d at 200. The Guidelines have the force of statutory law, Stinson v. United States, 508 U.S. 36, 45 (1993), and the maximum sentences contained in them "are incorporated into the federal statutes by 18 U.S.C. § 3553 (b)" and "may not be exceeded by sentencing judges." Kinter, 235 F.3d at 200. The Sentencing Commission remains "fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit ... at any time." Mistretta v. United States, 488 U.S. 361, 393-94 (1989); see also United States v. Ameline, 376 F.3d 967, 977 (9th Cir. 2004) (listing instances in which "Congress has utilized [its] authority to shape the Guidelines directly"). As Judge Posner noted in holding for the Seventh Circuit that the Blakely rule applies to the federal guidelines, "if a legislature cannot evade . . . the commands of the Constitution by a multistage sentencing scheme neither" can the Sentencing Commission, which is simply "exercising power delegated

to it by Congress." United States v. Booker, 375 F.3d 508, 511 (7th Cir. 2004), cert. granted, 73 U.S.L.W. 3073, 2004 WL 1713654 (Aug. 2, 2004).

C.

Most troubling, the majority's "understanding," which interprets Blakely as applying only to maximum sentences set forth in statutes and not to those set forth in the federal guidelines, undermines the very purpose of the Blakely holding.

The Supreme Court explained in Blakely that the Apprendi principle had to be applied to maximums set forth in sentencing guidelines to give "intelligible content" to Sixth Amendment rights, creating a "bright-line" rule. Blakely, 124 S. Ct. at 2538, 2540. Preservation of jury-trial rights as a "fundamental reservation of power in our constitutional structure," rather than a "mere procedural formality," required such a rule. Id. at 2538-39. Otherwise, a legislature could eviscerate Sixth Amendment rights by choosing to "label" a fact as a guidelines sentencing factor to be found by a judge by a preponderance of evidence, rather than a crime or element of a crime to be found by a jury beyond a reasonable doubt. Id. Yet the majority's holding, that maximum sentences set out in the federal guidelines do not constitute "statutory maximums" for "Apprendi purposes," leaves Congress free to undercut Sixth Amendment rights in the very manner Blakely sought to prohibit. Under the majority's holding, Congress can choose not to criminalize conduct yet still require the Sentencing Commission to develop guidelines mandating punishment of that very conduct upon a judicial finding by a mere preponderance of the evidence.

The Blakely Court clearly recognized that the federal guidelines presented this problem. Witness the Court's discussion of whether obstruction of justice should constitute a sentencing factor or a separate crime. Citing the

upward adjustment required upon a judicial finding of obstruction of justice in the federal guidelines, U.S.S.G. § 3C1.1, Justice O'Connor, in dissent, complained that the Blakely rule would prevent consideration at sentencing of obstructive behavior not discoverable before trial. See Blakely, 124 S. Ct. at 2546 (O'Connor, J., dissenting). In response, the Blakely majority suggested that perjury during trial should be "an entirely separate offense to be found by a jury beyond a reasonable doubt"; to treat it as a fact to be considered by the sentencing judge would be "[a]nother example of conversion from separate crime to sentence enhancement." Id. at 2540 n.11. Yet, in the case at hand, the majority sanctions exactly this "conversion," by affirming *a* sentence enhanced by a judicial finding of obstruction of justice, in a case in which the jury never considered any evidence as to obstruction.

Affirmance of the obstruction enhancement, moreover, is neither the most obvious nor most significant example in this case of the manner in which the majority's holding undermines Blakely's stated purpose of creating a bright-line rule safeguarding Sixth Amendment rights. For in the case at hand, the federal guidelines also required the district judge to determine if Hammoud acted with specific intent "to influence . . . the conduct of government by intimidation," 18 U.S.C. § 2332b(g)(5), and, if so, to apply a "terrorism adjustment" -- even though specific intent has long been recognized as an element of a crime to be determined by a jury beyond a reasonable doubt. See, e.g., Carter v. United States, 530 U.S. 255 (2000). The Guidelines-mandated application of the terrorism adjustment and other judicial findings increased Hammoud's sentence beyond what would have been justified by the jury's verdict alone by more than 3000%.

That the Sentencing Commission, not Congress itself, fashioned the guideline that required this "conversion" plainly fails to eliminate the Sixth Amendment problem

targeted by the Supreme Court. Not only is the Commission generally "fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit ... at any time," Mistretta, 488 U.S. at 393-94, but in this instance Congress expressly directed the Commission to promulgate a terrorism guideline, with specific intent as an "appropriate enhancement." See Violent Crime Control Act, Pub.L. 103-322, Sept. 13, 1994, 108 Stat. 1796, § 120004 (directing the Commission "to amend its sentencing guidelines to provide an appropriate enhancement for any felony . . . that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime"). Thus, the unconstitutional "conversion" of a crime to a sentencing factor is as clearly the responsibility of Congress in the case at hand as it was of the Washington legislature in Blakely.

In sum, the majority adopts an "understanding" of Blakely at odds with the case's holding and rationale, based entirely on a single fact of no importance to the Blakely Court itself. This "understanding" places form over effect, violating the Supreme Court's express mandate that "the dispositive question . . . 'is one not of form, but of effect.'" Ring, 536 U.S. at 602 (quoting Apprendi, 530 U.S. at 494) . Most regrettably, this "understanding" undermines the very purpose of the Blakely holding -- the creation of a bright-line rule to ensure protection of jury-trial rights. Instead of adopting this "understanding" of Blakely, we should follow Blakely as written. In short, we should, as the Supreme Court directed, hold that the "^statutory maximum' for Apprendi purposes is the maximum a judge may impose solely on the basis of facts reflected in the jury verdict". Blakely, 124 S.C. at 2537.

III.

The majority seeks to justify its refusal to follow Blakely's clear directive by asserting that to do so would

create two problems.[4] The justification fails; these alleged problems are mere makeweights.

A.

First, the majority contends that following this directive would mean that the Blakely Court did not, as it said it had, "apply" the Apprendi rule, but instead broadened that rule by "redefining" the term "statutory maximum" to extend the term to non-statutory sentences. See ante at 59-60, 63, 66. The majority's contention, however, rests on an entirely false premise: that the definition of "statutory maximum" set forth in Blakely differs from the Court's definition of that term in Apprendi.

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[4] Unlike the majority, which recognizes the Blakely (and Apprendi) directive but argues that it does not apply to the federal guidelines, Judge Wilkinson in concurrence essentially argues that the Supreme Court got it wrong. He contends that, "[i]f the judiciary is now to announce that sentencing factors must be found as elements beyond a reasonable doubt, that badly skews the balance that Congress has historically been able to strike between guilt and punishment," and represents an encroachment of the judiciary on the province of the legislature. Ante at 80. But treating "sentencing factors" that mandate enhancement of a sentence as "elements" is exactly what Blakely, Ring, and Apprendi hold the Sixth Amendment requires: "[A]11 facts legally essential to the punishment" must be proved to a jury beyond a reasonable doubt, Blakely, 124 S.C. at 2537—whether they are labeled "elements of the offense, sentencing factors, or Mary Jane." Ring., 536 U.S. at 610 (Scalia, J. concurring); see also Ring, 536 U.S. at 602; Apprendi, 530 U.S. at 494 n.19. In the face of this controlling precedent, the concurrence's diatribe is surprising --and inappropriate. (Although the concurrence offers a long, rhetoric-filled response to this footnote, ante at 83-4 n.l, it still refuses to acknowledge that the Supreme Court has already rejected its view that the legislature always controls what facts must be proved to a jury; the Court has concluded that all facts essential to punishment, including those denominated "sentencing factors" by the legislature, must be proved to a jury "to give intelligible content to the right of jury trial." Blakely, 124 S. Ct. at 2538. The Court apparently determined that this holding was not "antithetical to our democracy," ante at 83, but required by it, in order to accomplish the judiciary's most important function: protecting individual constitutional rights from legislative encroachment).

As the majority recognizes, the Blakely Court carefully explained that it did not "redefine" the term "statutory maximum," but simply "applied" the Apprendi understanding of that term. See Blakely, 124 S. C. at 2537. What the majority refuses to recognize is that the Blakely Court also carefully explained that the term "statutory maximum," as it was used in Apprendi, means "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. Thus, immediately prior to stating this definition of "statutory maximum," the Blakely Court noted that the definition was the one "made clear" by "[o]ur precedents," citing Apprendi and its progeny, Ring and Harris. Id.

That the courts of appeals, including this one in Kinter, misinterpreted the meaning of "statutory maximum" as used in Apprendi by construing it too narrowly, of course, sheds np_ light on the correct interpretation of the term in Apprendi. Rather, we must take the Supreme Court at its word -- that in Blakely it "applied" Apprendi, setting forth the meaning of "statutory maximum" as that term was used in Apprendi.

B.

The majority's other "problem" with following Blakely as written is that doing so would assertedly "undermine" or "outright nullify" Supreme Court decisions prior to Blakely. See ante at 61-67. This is a powerful argument -- if, but only if, a prior Supreme Court decision directly controls the case at hand. When that is so, of course, "Court [s] of Appeals should follow the [Supreme Court] case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." Agostini v. Felton, 521 U.S. 203, 237 (1997) (internal quotation marks and citation omitted). But, as the Government expressly conceded at oral argument, there is no Supreme Court case "directly

controlling" the case at hand. Thus, as the Government acknowledged, the Aqostini rule does not apply here. [5] Tellingly, in Kinter, this court took the same view. We did not suggest that holding that "statutory maximum" for Apprendi purposes included Guidelines' maximums would "undermine" or "outright nullify" Supreme Court precedent; instead, we characterized the issue as "complex" and recognized "at least a colorable argument that the Sentencing Guidelines do provide [the relevant] maximum." See Kinter, 235 F.3d at 200-201.

The majority carefully avoids citation of Aqostini (perhaps hoping to escape reminder of the Government's express concession and our rationale in Kinter) but nonetheless seeks to apply the Agostini rule and treat prior Supreme Court cases as squarely presenting (and resolving) the Sixth Amendment question at issue here. Prior Supreme Court precedent, however, simply does not reach the constitutional issue presented here. As every other court of appeals to have considered the question has held, the Supreme Court cases relied on by the majority "do not discuss the Sixth Amendment right to a jury trial" and a holding that the "statutory maximum" for "Apprendi purposes" includes Guidelines maximums "would not directly "overrule' any Supreme Court holding." Pineiro, 2004 WL 1543170, at *9; see also Ameline, 376 F.3d at 977-78; Booker, 375 F.3d at 513-14.

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[5] The Government's concession that the Aqostini rule does not apply here accords with the fine amicus brief the United States filed on behalf of the State in Blakely. There, the Government did not even imply that prior Supreme Court precedent precluded application of the Apprendi rule to the federal guidelines. On the contrary, the Government warned that "[a] decision in favor of [Blakely] could . . . raise a serious question about whether Apprendi applies to myriad factual determinations under the Guidelines." Brief for the United States as Amicus Curiae, No. 02-1632, 2004 WL 177025, at *26.

The fact is that the Supreme Court has never upheld the use of the judicial fact-finding mandated by the federal guidelines in the face of a direct Sixth Amendment challenge to that practice. Not one of the cases relied on by the majority reaches that question. In Mistretta, the Court simply held that the creation of the Sentencing Commission and federal guidelines did not violate separation of powers and delegation principles; the Court did not consider whether application of certain federal guidelines violated the Sixth Amendment. 488 U.S. at 393-94. In United States v. Watts, the Court ruled only that a Guidelines sentence withstood a Fifth Amendment Double Jeopardy challenge. 519 U.S. 148, 157 (1997). And, in Edwards v. United States, the Court expressly disclaimed consideration of any constitutional claims. 523 U.S. 511 (1998); id. at 516 (noting that we "need not, and we do not, consider the merits of petitioners' . . . constitutional claims").[6]

In refusing to follow Blakely's plain language, purportedly because to do so would "undermine" or "outright nullify" prior Supreme Court precedent, the majority does not just misapply the Aqostini rule. It also avoids our constitutional duty to decide properly presented claims in accord with current Supreme Court instruction. As

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[6] Moreover, the petitioners in Edwards did not raise a Sixth Amendment challenge to sentencing factors grounded in judicial findings under the Guidelines; they argued only that the sentencing judge's selection of the relevant maximum under the statutes at issue violated the Sixth Amendment. See Ameline, 376 F.3d at 978 (characterizing Edwards in the same way); Booker, 375 F.3d at 514 (observing that "the petitioners in Edwards did not argue that the sentencing guidelines are unconstitutional" and concluding that "[t]he most that can be dug out of their briefs ... is that they were urging a statutory interpretation that would avoid a Sixth Amendment issue") (emphasis in original) . Accordingly, it is hardly surprising that, notwithstanding the majority's reliance on Edwards, we did not cite the case in Kinter, let alone suggest, as the majority now does, that Edwards answered the question of whether the Apprendi rule applies to the Guidelines. Nor did the Government, which now also heavily leans on Edwards, even mention the case in its amicus brief in Blakely.

Judge Bork explained, even if lower courts believe, as the majority apparently does, that "more recent decisions" of the Supreme Court "create discontinuities with older precedent," lower courts must discern and apply the law as it presently exists and "leave" the "resolution of such discontinuities, if such there be" to the Supreme Court. Haitian Refugee Center v. Gracey, 809 F.2d 794, 798 (D.C. Cir. 1987) (Opinion of Bork, J.).

IV.

The majority offers no legitimate reason for refusing to apply the Supreme Court's instruction -- "that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 124 S.C. at 2537 (emphasis in original). The Supreme Court has held that the Sixth Amendment affords " [el very defendant . . . the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." Id. at 2543 (first emphasis added). Neither the Supreme Court, nor the Constitution, permits us to deny this right to defendants prosecuted by the federal government. The majority's holding does precisely that. Accordingly, I must respectfully dissent.

Judge Michael and Judge Gregory join in this dissent.

GREGORY, Circuit Judge, dissenting:

I join in full Judge Motz's fine dissenting opinion on the Blakely issues. I write separately, however, to dissent from the judgment. I believe the majority incorrectly concludes that AEDPA's "material support" provision, 18 U.S.C. § 2339B, is constitutional as applied in this case. As the Ninth Circuit has held, a strict textual reading of § 2339B(a)(1)'s plain language raises serious due process concerns. See Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 396 (9th Cir. 2003) (hereinafter "Humanitarian Law

Project III") ("We believe that serious due process concerns would be raised were we to accept the argument that a person who acts without knowledge of critical information about a designated organization presumably acts consistently with the intent and conduct of that designated organization.").[1]

Unlike the Ninth Circuit, however, I do not believe that these constitutional infirmities can be cured by reading the statutory term "knowingly" as a scienter requirement meaning only that the defendant had knowledge of the organization's designation as a foreign terrorist organization ("FTO"), or that he or she knew of the organization's unlawful activities that caused it to be so designated. See id. at 400. But cf. Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000) ("Humanitarian Law Project II") (Kozinski, J.) (stating "the term 'knowingly' modifies the verb 'provides,' meaning that the only scienter requirement here is that the accused violator have knowledge of the fact that he has provided something, not knowledge of the fact that what is provided in fact constitutes material support") . Instead, I would follow the reasoning of United States v. Al-Arian, 308 F. Supp. 2d 1322 (M.D. Fla. 2004), and conclude that to save the statute, one must apply the mens rea requirement to the entire "material support" provision such that the government must prove that the defendant (1) knew the organization was a FTO or knew of the organization's unlawful activities that caused it to be so designated and (2) knew what he or she was providing was "material support," i.e., the government must show that the defendant had a specific intent that the support would further the FTO's illegal activities. Because Hammoud was convicted of "material support" without the proper scienter requirement, violating his constitutional rights under the First and Fifth

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[1] The Ninth Circuit and most other courts citing the Humanitarian Law Project cases use these Roman numeral designations, referring to the original district court case, Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176 (CD. Cal. 1998), as "Humanitarian Law Project I".

Amendments, I would hold that these constitutional violations constitute plain error and thus vacate his material support conviction.

I.

Hammoud and his Amici Curiae, the Center for Constitutional Rights, the National Coalition to Protect Political Freedom, the National Association of Criminal Defense Lawyers, and the National Lawyers Guild, raise a bevy of constitutional challenges to Hammoud's conviction under 18 U.S.C. § 2339B, including assertions that the "material support" provision is vague and overbroad in violation of the First Amendment, and that the statute violates the First and Sixth Amendments because the defendant cannot challenge the FTO designation. Moreover, Hammoud and Amici Curiae challenge Hammoud's conviction on the basis that the statute lacks a specific intent requirement, which they contend is essential to avoid "guilt by association" in violation of the First and Fifth Amendments.

A.

To be sure, Hammoud faces a most difficult burden in this case because he failed to raise his constitutional claims at trial. Accordingly, we review his claims for plain error. United States v. Higgs, 353 F.3d 281, 324 (4th Cir. 2003) (reviewing constitutional claim not raised below for plain error); United States v. Ferguson, 211 F.3d 878, 886 (5th Cir. 2000) (reviewing allegation of constitutional violation for plain error because defendant failed to raise the issue below). But cf. United States v. Osborne, 345 F.3d 281, 284 n.2 (4th Cir. 2003) (noting that the Tenth Circuit applies the plain error rule "less rigidly" when reviewing constitutional issues) (citing United States v. Ciapponi, 77 F.3d 1247, 1249-

50 (10th Cir. 1996)).[2] To satisfy this standard, Hammoud must show that (1) an error occurred,(2) the error was plain, (3) and the error affected his substantial rights. United States v. Olano, 507 U.S. 725, 731-34 (1993); accord Johnson v. United States, 520 U.S. 461, 467 (1997). If the first three elements are met, we may exercise our discretion to correct such forfeited error only where it "seriously affect [s] the fairness, integrity or public reputation of judicial proceedings." Olano, 507 U.S. at 732 (internal quotation marks and citations omitted); see also Fed. R. Crim. P. 52 (b) (2002) ("A plain error or defect that affects substantial rights may be considered even though it was not brought to the court's attention."). When "overwhelming and essentially uncontroverted" evidence exists to support the challenged finding, there is "no basis for concluding that the error seriously affected the fairness, integrity or public reputation of judicial proceedings." United States v. Cotton, 535 U.S. 625, 633 (2002) (internal quotation marks and citations omitted).

B.

In 8 U.S.C. § 1189(a), Congress authorized the Secretary of State (hereinafter the "Secretary") to designate an organization as a "foreign terrorist organization." To exercise this authority, the Secretary must find the organization (1) is foreign, (2) engages in terrorist activity, and (3) such activity threatens the security of United States nationals or the national security of the United States. Id. § 1189(a)(1).[3] In determining whether to designate an organization as a FTO, the Secretary is not required to notify

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[2] Furthermore, the Ninth Circuit has held that it may, in its "discretion, resolve a pure issue of law raised for the first time on appeal . . . when 'injustice might otherwise result.'" Humanitarian Law Project III, 352 F.3d at 394 (quoting Singleton v. Wulff, 428 U.S. 106, 121 (1976)).

[3] "Terrorist activity" is defined in 8 U.S.C. § 1182(a)(3)(B), and "national security" is defined in § 1189(c)(2), although those definitions are not at issue in this case.

the organization being considered for designation. Moreover, the organization does not have a right to be heard during the designation process.[4] Instead, the Secretary compiles an "administrative record" in which "findings" are made as to whether an organization is to be designated. Id. §§ 1189(a)(2)(A)(i), (3)(A).

If an organization is so designated, the consequences are "dire." Nat'l Council of Resistance of Iran, 251 F.3d at 196. Its members and representatives may not enter the United States, 8 U.S.C. § 1182(a)(3)(B)(i), its assets may be frozen by the Department of Treasury, id. § 1189(a)(2)(C), and financial institutions are required to freeze its assets, 18 U.S.C. § 2339B(a)(2). Moreover, as is at issue here, § 2339B makes it a crime punishable by a maximum of life imprisonment if a person "knowingly provides material support or resources" to such an organization. Id. § 2339B(a)(1). "Material support or resources" includes "currency or monetary instruments, financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine and religious materials." Id. §§ 2339A(b), 2339B(g)(4).[5] The statute does not define what those terms mean in the context of the proscribed activity.

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[4] In Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 208 (D.C. Cir. 2001), the D.C. Circuit held that these provisions violated the Fifth Amendment's due process requirement, and thus held that the entities under consideration have a due process right to "notice that the designation is pending." However, the court also crafted an exception in instances where "notification would impinge upon the security and other foreign policy goals of the United States." Id.

[5] The Patriot Act modified this definition, but that revision is not at issue here.

A designated organization may seek review of the Secretary' s designation, but may only do so in the Court of Appeals for the District of Columbia. Id. § 1189(b)(1). The District of Columbia Circuit's review is "based solely upon the administrative record," but the government may submit classified information for in camera review. Id. § 1189(b)(2). Moreover, the Secretary's designation may only be set aside if it is arbitrary or capricious, or otherwise contrary to law. Id. Finally, § 1189(a)(8) expressly states that a defendant may not contest the validity of the organization's designation as a defense or objection at trial.

In both October of 1997 and October of 1999, the Secretary designated Hizballah as a FTO. 64 Fed. Reg. 55,112 (1999); 62 Fed. Reg. 52,650 (1997). Neither the record nor case law indicates that Hizballah has ever challenged the validity of this designation.

In the instant case, Count 72 of the Second Superceding Indictment alleged that Hammoud engaged in a conspiracy to provide "material support" to Hizballah and that its objective was to furnish the FTO "currency, financial services, training, false documentation and identification, communications equipment, explosives and other physical assets to Hizballah and its operatives, in order to facilitate its violent attacks." J.A. 482 ¶ 3. Hammoud was identified as a fund-raiser, id. at 483 ¶ 4(e), and Count 78 alleged that he provided material support to Hizballah by transmitting $3,500 to Sheik Abbas Harake via Said Harb, id. at 498 ¶ 2. The jury convicted Hammoud on both counts.

II.

As noted above, Hammoud levies a series of interwoven[6] First and Fifth Amendment challenges against AEDPA's material support provisions. Specifically, he alleges that the material support provision (1) penalizes association; (2) is impermissibly vague; (3) is facially overbroad;[7] and (4) violates due process and his Sixth Amendment right to a jury trial.[8]

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6 Indeed, the freedom of association and vagueness arguments necessarily blend with the Fifth Amendment claim regarding the statute's criminalization of conduct without the requisite "personal guilt." In short, the law lacks the sufficient clarity that would allow persons of "ordinary intelligence a reasonable opportunity to know what is prohibited." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). However, even if an individual would reasonably understand that all support of a FTO is prohibited, when the statute is applied without a specific intent requirement, a tension arises because the statute criminalizes "support" of a FTO, though the defendant's conduct has no connection to "concededly criminal activity," thus violating the Fifth Amendment.

7 It is not necessary to discuss Hammoud's overbreadth challenge in any significant fashion because the overbreadth standard is a exceedingly narrow exception to the normal rule regarding facial challenges. See Virginia v. Hicks, 539 U.S. 113, 118 (2003). As such "[e]ven where a statute at its margins infringes on protected expression, ^facial invalidation is inappropriate if the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.'" Osborne v. Ohio, 495 U.S. 103, 112 (1995) (quoting New York v. Ferber, 458 U.S. 747, 770 n.25 (1982)). Here, because statutory terms such as "weapons" and "explosives" are clearly not overbroad, this substantiality showing is most difficult to overcome.

8 Likewise, I do not discuss in detail the Sixth Amendment argument raised with reference to the Secretary of State's designation provisions, because it lacks merit. In short, while the fact of the Secretary' s designation is an element of the offense, the designation's validity is not. Cf. United States v. Bozarov, 974 F.2d 037, 1045-46 (9th Cir. 1992) (because Secretary's licensing designation was not an element of the criminal charge, defendant's inability to challenge designation did not violate due process); United States v. Mandel, 914 F.2d 1215, 1221 (9th Cir. 1990) (holding under Export Administration Act, Secretary's decision to control a commodity "does not involve the defendant's individual rights and is not an element of the charged offense").

A.

Hammoud and Amici Curiae argue that the "material support" provision is unconstitutional because it penalizes association, in violation of the First Amendment, and fails to require the requisite specific intent, thus contravening the Fifth Amendment requirement of "personal guilt." They first frame these arguments by relying on the unimpeachable, but basic and preliminary, proposition that the Constitution protects individuals from being punished solely because of their association with a group. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982) (holding that "liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence"); Healy v. James, 408 U.S. 169, 186 (1972) (holding that "guilt by association" may not be imposed); Scales v. United States, 367 U.S. 203, 229 (1961) ("If there were a [] blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired.").

The counter argument to this basic proposition, of course, is that § 2339B does not seek to impose criminal liability for association or membership alone, but instead does so for involvement in terrorism – i.e., "material support." In this vein, the government asserts that

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In United States v. Sattar, 272 F. Supp. 2d 348, 367 (S.D.N.Y. 2003), the court applied this reasoning to reject precisely the sort of challenge Hammoud levies, stating "[t]he correctness of the designation itself is not an element of the offense and therefore the defendants' right to due process is not violated by their inability to challenge the factual correctness of that determination." See also Al-Arian, 308 F. Supp. 2d at 1344-47 (rejecting the same). But see United States v. Rahmani, 209 F. Supp. 2d 1045, 1053-58 (CD. Cal. 2002) (finding individual defendant had standing to challenge an organization's designation and that § 1189 is unconstitutional).

Hammoud's arguments obscure the gravamen of the offense of which he was convicted; specifically, it argues that the overt act of providing $3,500 to Said Harb, which was passed on to Sheik Abbas Harake, is distinguishable from association.[9] To advance its argument, the government relies on a body of cases in which AEDPA's material support provision has been held distinguishable from a prohibition on association. See People's Moiahedin Org. of Iran v. Dep't of State, 327 F.3d 1238, 1244 (D.C. Cir. 2003) (holding the material support provision does not violate rights of free speech and association); Humanitarian Law Project II, 205 F.3d at 1133 ("[AEDPA] does not prohibit being a member of one of the designated groups .... Plaintiffs are even free to praise the group for using terrorism as a means of achieving their ends. What AEDPA prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives .... Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives."); United States v. Sattar, 272 F. Supp. 2d 348, 368 (S.D.N.Y. 2003) (rejecting "associational rights" claim); United States v. Lindh, 212 F. Supp. 2d 541,

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[9] Indeed, a pure First Amendment freedom of association argument may be somewhat overstated because Hammoud's prosecution did not rely on mere association to the extent at issue in the communist cases; rather, the indictment alleged that he "knowingly provide[d] . . . material support or resources to Hizballah . . . by causing Said Harb to transport $3,500 ... to Sheik Abbas Harake." J.A. 498. Nonetheless, as discussed below, the statute does not avoid the "personal guilt" infirmity.

549 (E.D. Va. 2002) (same).[10] Typical of this line of cases in which pure First Amendment challenges are at issue, in Humanitarian Law Project II, 205 F.3d at 1133-34, the Ninth Circuit considered the constitutionality of AEDPA's material support provision. In doing so, the Ninth Circuit held that a "specific intent" requirement, as in the communism cases, should not apply to the provision of material support, because donating money and resources to a designated group is different than being a mere member of, or advocate for, the group in question. Id.

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[10] Relatedly, in defending the statute from First Amendment attack, the government asserts that AEDPA need only satisfy the intermediate scrutiny standard of United States v. O'Brien, 391 U.S. 367, 376-77 (1968). See Humanitarian Law Project II, 205 F.3d at 1135 (holding that the material support restriction did not warrant strict scrutiny "because it is not aimed at interfering with the expressive component of their conduct but at stopping aid to terrorist groups"). Under O'Brien, the court must determine whether: (1) the regulation is within the government's power; (2) it supports an important or substantial government interest; (3) the regulation is unrelated to the suppression of speech; and (4) the restriction on speech is no greater than necessary. 391 U.S. at 377. While, assuming arguendo that intermediate scrutiny applies and AEDPA satisfies the first three standards as the regulation is within the war and foreign policy powers, serves an important interest in preventing terrorism, is arguably related to suppressing certain conduct, not speech, the emphasis of our inguiry falls on whether AEDPA is sufficiently well tailored to meet these end goals. I suggest that it is not because the "material support" provision's vast sweep leads to a Fifth Amendment violation. Because I believe such a result follows under O'Brien, I do not examine a strict scrutiny challenge to the statute. I note, however, that the Amici make, at least, a colorable argument that strict scrutiny applies. See Br. of Amici Curiae at 11 n.2 (arguing AEDPA's material support statute "does not impose a content-neutral ban on conduct . . . but instead punishes particular support only when done in association with specific disfavored political groups. . . . The ^material support' statute's prohibition on designated groups is analogous to a campaign finance law that restricted contributions only to particular political parties selected by the incumbent government."); see also Al-Arian, 308 F. Supp. 2d at 1334-35 (recognizing that level of scrutiny applied would depend on how broadly the court interpreted AEDPA; "[t]he broader this Court interprets [the statute], the more likely that the statute[] receive[s] a higher standard of review and [is] unconstitutional").

B.

Here, however, Hammoud and Amici Curiae also advance a legally independent – though somewhat interrelated to the First Amendment argument – Fifth Amendment Claim, see Scales, 367 U.S. at 225 (analyzing Fifth Amendment claim "independently of the claim made under the First Amendment"), which Humanitarian Law Project II and the other cases noted above did not reach. Specifically, to pass Fifth Amendment scrutiny and to avoid a "personal guilt" problem, they argue that AEDPA's material support provision must include a scienter requirement, whereby the defendant must be found guilty of a specific intent to further the illegal aims of the association. Br. of Appellant at 25; Br. of Amici Curiae at 6 ("This statute is so sweeping that it would apply to a citizen who sent a human rights or constitutional law treatise to Hizballah to urge it to respect human rights and desist from committing terrorist acts."). Hammoud and Amici Curiae rely on more Communist Party cases to support their argument that AEDPA's "material support" provision is unconstitutional without such a specific intent requirement. See, e.g., United States v. Robel, 389 U.S. 258, 264 (1967) (striking sections of statute that prohibited communists from registering to engage in employment at defense facilities); Aptheker v. Sec'y of State, 378 U.S. 500, 511 (1964) (striking down statutory provisions that prohibited members of communist organization from applying for or using a passport because statute did not require specific intent to further the unlawful aims of the organization); Scales, 367 U.S. at 224-25 (stating that "[i]n our jurisprudence guilt is personal" and holding that punishment can only be justified by connecting "status or conduct to other concededly criminal activity"). In such cases, the Court held that statutory prohibitions "swep[t] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment," Aptheker, 378 U.S. at 514, because the statutes carried the "danger of punishing a member of a Communist

organization 'for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not share.'" Id. at 512 (quoting Noto v. United States, 367 U.S. 290, 299-300 (1961) and citing Scales, 367 U.S. at 299-300).

Hammoud and Amici Curiae assert that without a specific intent requirement, AEDPA's material support provision suffers the same fate. In this context, Amici Curiae posit that Humanitarian II's isolated focus on the First Amendment renders the prohibition on guilt by association a meaningless formality because under the Ninth Circuit's reasoning:

> [E]very anti-Communist law struck down by the Supreme Court for imposing guilt by association could have simply been rewritten to penalize dues payments to the Party. It would also lead to the anomalous result that while leaders of the NAACP could not be held responsible for injuries sustained during an NAACP-led economic boycott absent proof of specific intent, Claiborne Hardware, 458 U.S. at 920, the NAACP's thousands of individual donors could have been held liable without any showing of specific intent.

Amicus Br. at 8-9. As the Supreme Court has stated in the Fifth Amendment context:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to that relationship of that status or conduct to other concededly criminal activity . . ., that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

Scales, 367 U.S. at 224-25. Accordingly, Hammoud and Amici Curiae argue that without a scienter requirement of specific intent, the necessary connection to criminal activity is wanting. Nevertheless, the government argues, Br. of Gov't at 22 n.9, that the Ninth Circuit's most recent examination of the "material support" provision within the Fifth Amendment context in Humanitarian Law Project III assures that the necessary scienter requirement is satisfied, thus preventing any Fifth Amendment violation. In Humanitarian Law Project III, the Ninth Circuit considered a Fifth Amendment "personal guilt" challenge to the "material support" provisions, and correctly recognized that "serious due process concerns" would be raised by § 2339B unless the statute is applied with a scienter requirement. 352 F.3d at 393-94, 396-97. Like in the Communist Party cases upon which Hammoud and Amici Curiae rely, the Ninth Circuit stated that AEDPA's material support provision "presumes that a person acts with guilty intent whenever that person provides material support to a designated organization." Id. at 396. The court further remarked, "to attribute the intent to commit unlawful acts punishable by life imprisonment to persons who acted with innocent intent--in this context, without critical information about the relevant organization—contravenes the Fifth Amendment's requirement of 'personal guilt.'" Id. at 397.

However, to avoid the "serious due process concerns [that] would be raised were we to accept the argument that a person who acts without knowledge of critical information about a designated organization presumably acts consistently with the intent and conduct of that designated organization," id., the Ninth Circuit followed the Supreme Court's guidance "that 'a statute is to be construed where fairly possible so as to avoid substantial constitutional questions.'" Id. (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994)). Thus, in its efforts to apply § 2339B constitutionally, the court adhered to well-settled Supreme Court law that there is a presumption of

construing criminal statutes to include a mens rea requirement. Id. (citing cases). In applving those principles, the Ninth Circuit determined, as a matter of statutory interpretation, that § 2339B "does not in any way suggest that Congress intended to impose strict liability on individuals who donate ^material support' to designated organizations." Id. at 399. Accordingly, the Ninth Circuit read the word "knowingly" as a limited specific intent requirement, demanding "proof that a defendant knew of the organization's designation as a terrorist organization or proof that a defendant knew of the unlawful activities that caused it to be so designated ... to convict a defendant under the statute." Id. at 400; see also id. at 402-03 (holding that to convict under § 2339B, "the government must prove beyond a reasonable doubt that the donor had knowledge that the organization was designated by the Secretary as a [FTO] or that the donor had knowledge of the organization's unlawful activities that caused it to be so designated").

While the Ninth Circuit's interpretation of "knowingly" is more advanced than the quasi-strict liability standard upon which Harrtmoud was convicted, infra, I submit that such an interpretation of § 2339B's mental state requirement is still insufficient to withstand constitutional attack. In finding as much, I am in agreement with the recent and well reasoned opinion in United States v. Al-Arian, 308 F. Supp. 2d 1322 (M.D. Fla. 2004), in which the court considered defendants' motion to dismiss an indictment alleging a violation of AEDPA's "material support" provisions.

In Al-Arian, the court agreed with the Ninth Circuit that "a purely grammatical reading of the plain language of Section 2339B(a)(1) makes it unlawful for any person to knowingly furnish any item contained in the material support categories" to a FTO, rendering the provision constitutionally infirm. Id. at 1337 (citing Humanitarian II). The court, however, disagreed with the Ninth Circuit's attempt to salvage the statute based on application of the

statutory term "knowingly" in Humanitarian III, stating that the Ninth Circuit's construction "only cures some of the Fifth Amendment concerns." Id. The Al-Arian court first correctly recognized that the Ninth Circuit failed to comply with the Supreme Court's X-Citement Video holding wherein it stated that a mens rea requirement "should apply to each of the statutory elements that criminalize otherwise innocent conduct," 513 U.S. at 72, because Humanitarian III applied the mens rea requirement only to the FTO element, not the material support element. Al-Arian, 308 F. Supp. 2d at 1337. As such, the Al-Arian court found that under the Ninth Circuit's construction:

> [A] cab driver could be guilty for giving a ride to a FTO member to the UN, if he knows that the person is a member of a FTO .... Similarly, a hotel clerk in New York could be committing a crime by providing lodging to that same FTO member under similar circumstances as the cab driver.

Id. at 1337-38.[11] Accordingly, the court rejected Humanitarian III's construction, stating that the Ninth Circuit did not resolve the vagueness concerns. Id. at 1338.[12]

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[11] Similarly, Amici Curiae properly recognize that the jury was not instructed that it had to find Hammoud intended the donation to be used for any violent, terrorist, or otherwise unlawful purpose, thus setting up the anomalous result that under § 2339B "Hammoud would be guilty even if it were stipulated that his support was intended to further only Hizballah's lawful activities [while] an individual who gave a donation to a non-designated group intending that it be used for terrorist activity would not be guilty." Br. of Amici Curiae at 6.

[12] Even Humanitarian II seemed to acknowledge that the term "knowingly" did not cure any vagueness problems that existed. See 205 F.3d at 1138 n.5 ("[T]he term 'knowingly' modifies the verb ^provides' meaning that the only scienter requirement here is that the accused violator have knowledge of the fact that he has provided something, not knowledge of the fact that what is provided in fact constitutes material support.").

Yet rather than declare § 2339B unconstitutionally vague, the court applied a saving construction consistent with X-Citement Video, and applied the statute in the manner Hammoud and Amici Curiae advocate. Id. at 1338-39. The court stated:

> to convict a defendant under Section 2339B(a) (1) the government must prove beyond a reasonable doubt that the defendant knew that (a) the organization was a FTO or had committed unlawful activities that caused it to be so designated; and (b) what he was furnishing was "material support." To avoid Fifth Amendment personal guilt problems . . . the government must show more than a defendant knew something was within a category of "material support" in order to meet (b). In order to meet (b), the government must show that the defendant knew (had a specific intent) that the support would further the illegal activities of a FTO.

Id. at 1338-39 (emphasis added).[13] Indeed, I note that the Al-Arian court's interpretation of § 2339B's intent requirement, with which I fully agree, is supported by statements in the

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[13] Additionally, I note that even without the scienter requirement which I advocate, various courts have struck aspects of the "material support" provisions as void for vagueness. See Humanitarian II, 205 F.3d at 1137 (holding that term "personnel" is void for vagueness as the law is not "sufficiently clear so as to allow persons of ^ordinary intelligence' a reasonable opportunity to know what is prohibited") (internal quotation marks omitted) (citing Grayned, 408 U.S. at 108); id. at 1138 (holding the term "training" is also void for vagueness, and stating "a plaintiff who wishes to instruct members of a designated group on how to petition the United States" for assistance could violate AEDPA); Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1199 (CD. Cal. 2004) (holding "expert advice or assistance" is impermissibly vague); Sattar, 272 F. Supp. 2d at 361 (holding "personnel" and provision of "communications equipment" were impermissibly vague); see also Humanitarian III, 352 F.3d at 403 (reiterating Humanitarian II holding that terms "personnel" and "training" were impermissibly vague). But cf. Lindh, 212 F. Supp. 2d at 572-73 (holding term "personnel" was not overbroad).

Congressional Record by Senator Hatch, who cosponsored AEDPA. In introducing the Senate Conference Report to the Senate, Senator Hatch remarked: "This bill also includes provisions making it a crime to knowingly provide material support to the terrorist functions of foreign groups designated by a Presidential finding to be engaged in terrorist activities." 142 Cong. Rec. 7550 (April 16, 1996) (statement of Sen. Hatch) (emphasis added). In discussing the law, Senator Hatch seemingly made clear that the law's prohibitions on financing were connected to terrorist acts; he stated:

> [N]othing in the Constitution provides the right to engage in violence against fellow citizens or foreign nations. Aiding and financing foreign terrorist bombings is not constitutionally protected activity. . . I have to believe that honest donors to any organization want to know if their contributions are being used for such scurrilous terrorist purposes. We are going to be able to tell them after this bill. . . I am convinced we have crafted a narrow but effective designation provision which meets these obligations while safeguarding the freedom to associate, which none of us would willingly give up.

Id. at 7557 (statement of Sen. Hatch) (emphasis added).

Furthermore, the Al-Arian court also recognized its conclusions regarding § 2339B were consistent with the Seventh Circuit' s treatment of the material support provisions in Boim v. Quranic Literacy Institute & Holy Land Foundation for Relief and Development, 291 F.3d 1000 (7th Cir. 2002), which addressed § 2339B in a related context. See Al-Arian, 308 F. Supp. 2d at 1339 n.33. In Boim, the Seventh Circuit considered whether a § 2339B violation could serve as a basis for § 2333 civil liability. The Seventh Circuit acknowledged that the statute contained "tension" regarding a "definition of acts of international terrorism ... so

broad that [defendants] might be held liable for involvement in terrorist activity when all they intended was to supply money to fund the legitimate, humanitarian mission of Hamas or other organizations." Boim, 291 F.3d at 1022. To resolve that tension arising "when a group engages in both protected advocacy and unprotected criminal acts," the Seventh Circuit turned to Claiborne Hardware, Scales and other Communist Party cases and held that to succeed on a § 2333 claim, a plaintiff must prove "'that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.'" Id. at 1022-23 (quoting Claiborne Hardware, 458 U.S. at 920). Specifically, the Seventh Circuit reasoned that in the § 2333 context, such a showing requires proof "that the defendants knew of [the organization's] illegal activities, that they desired to help those activities succeed, and they engaged in some act of helping the illegal activities." Id. (citation omitted); see also id. at 1024 (stating that it was "irrelevant" if the organization engaged in "legitimate advocacy or humanitarian efforts ... if [defendants] knew about [the organization's] illegal operations, and intended to help [the organization] accomplish those illegal goals when they contributed money to the organization") (citing Claiborne Hardware, Scales and other cases). In the instant case, the district court did nothing to insure that the jury was instructed upon, and the government met, the proper scienter burden as described above.[14]

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[14] Finally, the Al-Arian court remarked that the government's scienter burden is not "that great in the typical case." 308 F. Supp. 2d at 1339. It suggested that the intent can often be easily inferred by juries, e.g., "a jury could infer a specific intent to further the illegal activities of a FTO when a defendant knowingly provides weapons, explosives, or lethal substances to an organization that he knows is a FTO because of the nature of the support." Id. More germane to the instant case, Al-Arian also suggested that "a jury could infer a specific intent when a defendant knows that the organization continues to commit illegal acts and the defendant provides funds to that organization knowing that money is fungible and, once received, the donee can use the funds for any purpose it chooses." Id.

For the foregoing reasons, I believe that § 2339B's "material support" provisions constitute a violation of the Fifth Amendment when applied without the necessary specific intent requirement. Unlike the situation faced in Al-Arian, however, in Hammoud's case it is many days too late to apply a savings instruction – or to preliminarily enjoin the government from applying the "material support" provision as written, as in Humanitarian Law Project III – therefore, I turn to the application and effect of the constitutional error in this case.

III.

As noted above, to obtain relief on his claim, Hammoud must satisfy the plain error standard, showing that (1) an error occurred, (2) the error was plain, i.e., obvious or clear, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity or public reputation of judicial proceedings. Olano, 507 U.S. at 731-34. For the reasons that follow, I would find that Hammoud satisfies Olano's plain error standard and he should be granted a new trial on the "material support" charge.

A.

As discussed at length above, when § 2339B's "material support" provision is applied without a scienter requirement, as in this case, constitutional error occurs. In Hammoud's case, that error materialized when the jury was instructed that they could convict Hammoud of violating AEDPA's material support provision without instructing them of the necessary scienter requirement. On Count 78, the district court judge instructed the jury that to convict Hammoud under 18 U.S.C. § 2339B, "three essential elements" must be found. (1) "[Hammoud] provided or attempted to provide material support or resources to Hizballah, a designated foreign terrorist organization;" (2) "[Hammoud] was within the United States or subject to the

jurisdiction of the United States;" and (3) "[Hammoud] did such act knowingly. . . . You will recall the definition[] I previously gave you for the term[] . . . knowingly." J.A. 3391-92. Regarding "knowingly," the district court had previously charged the jury with the instruction: "The term 'knowingly' as used in these instructions to describe the alleged state of mind of the defendant, means that he was conscious and aware of his action, realizing what he was doing or what was happening around him, and did not act because of ignorance, mistake or accident." Id. at 3302.

In short, the district court judge gave the jury no instructions regarding a scienter requirement – whether in a manner akin to that employed by the Ninth Circuit or the Middle District of Florida – for AEDPA's "material support provision." While we review an erroneous jury instruction in light of the entire charge, Jones v. United States, 527 U.S. 373, 390-91 (1999), the district court in the instant case erred by failing to provide appropriate guidance regarding a specific intent requirement.

B.

In finding that the error was plain, I suggest that despite the fact that Hammoud's trial counsel did not properly serve up the Fifth Amendment claim here at issue, the district court judge was well-aware of the sweeping nature of the "material support" charge and the inherent possibility that it would criminalize conduct without personal guilt. At the charge conference, the government advocated that the court take the Ninth Circuit's approach in Humanitarian Law Project II. Citing that case, the government stated, "[y]ou may find a violation even if the defendant did not intend to aid in the organization's unlawful activities. The whole thing was just sending it to the orphans to [sic] Hizballah." J.A. 3256 (emphasis added). While the prosecutor's statement was clearly tongue-in-cheek, the impact of the

"material support" provision as applied had the effect which the prosecutor suggested. Under the district court's instructions, Hammoud could have been convicted for helping assist Hizballah orphans or humanitarian works if the organization had such projects. While the district court declined to enter the quasi-strict liability instruction that the government advocated, the judge told the prosecutor, "[y]ou can argue that. I'm not going to quote anything from the Ninth Circuit until the Fourth Circuit tells me okay." Id. at 3256.

Furthermore, the district court implicitly acknowledged the existence of the constitutional infirmities challenged on appeal, yet it chose to proceed with the scienter-less instruction nonetheless. In discussing "material support," the following colloquy took place between the district court judge and the federal prosecutor:

THE COURT: Material support. Define. Now question: Is there any evidence or any question about materiality or is anything that goes considered material support.

[GOVERNMENT]: Except for medicine or religious materials. I think that's in the --

THE COURT: I guess if you get a few bucks, is that material support? Right out of the statute.

[HAMMOUD'S COUNSEL]: You can throw bibles at them but not money.

THE COURT: Book of stamps and that's material. All right.

Id. at 3257-58. Thus, the district court judge instructed the jury without imposing a scienter requirement despite an implicit understanding that the "material support" provision potentially criminalizes a broad sweep of conduct which has no connection to "concededly criminal activity," and the fact that various aspects of the "material support" provisions had already been held to violate the First Amendment. See Humanitarian Law Project II, 205 F.3d at 1137-38 (holding terms "training" and "personnel" in AEDPA's "material support" provision were unconstitutionally vague).

In demonstrating the plain nature of AEDPA's constitutional deficient mens rea requirement, perhaps it is best to compare that statute to the Supreme Court's treatment of the Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2252, which the Court held was unconstitutional when applied without a scienter requirement in X-Citement Video, 513 U.S. at 68-72. See Al-Arian, 308 F. Supp. 2d at 1335 (stating that in X-Citement Video, "the Supreme Court faced almost the same statutory interpretation issues" as those raised by AEDPA's material support provision). In X-Citement Video, the Supreme Court interpreted a statutory provision which criminalized the "knowing" transport, shipment, receipt, distribution or production of a "visual depiction involv[ing] the use of a minor engaging in sexually explicit conduct." 513 U.S. at 68 (citing 18 U.S.C. § 2252) (internal quotation marks omitted). The Supreme Court rejected the Ninth Circuit's interpretation that the "knowing" mens rea element applied only to the relevant verbs, rather than to the facts that minors were involved and the material was sexually explicit. See id. at 68-69.

The Court held that the Ninth Circuit's construction led to absurd results under the First Amendment. See id. at 69. For example, "a retail druggist who returns an uninspected roll of developed film to a customer 'knowingly distributes'

a visual depiction and would be criminally liable if it were later discovered that the visual depiction contained images of children engaged in sexually explicit conduct." Id. In this manner, the Ninth Circuit's absurd construction of the statute in X-Citement Video is closely related to the absurd results, see supra at 18, which necessarily follow from interpreting AEDPA's "material support" provisions without a scienter requirement. Thus, from the reasoning in X-Citement Video, see 513 U.S. at 70-77, it should have been apparent to the district court that to avoid such absurd results in the AEDPA context the jury needed to be instructed that the specific intent requirement had to be applied to each element of the statute. For the end result of applying "knowingly" as did the Ninth Circuit in Humanitarian Law Project III "is to render a substantial portion of Section 2339B unconstitutionally vague." Al-Arian, 308 F. Supp. 2d at 1338.

C.

The failure to require the jury to find what should have been the elements of the material support offense affected Hammoud's substantial rights. By not being instructed on a scienter requirement, the jury was not presented an essential element of the "material support" offense, and as the Third Circuit has remarked, "the omission of an essential element of an offense [in a jury instruction] ordinarily constitutes plain error" satisfying Olano. United States v. Havwood, 363 F.3d 200, 207 (3d Cir. 2004) (internal quotation marks and citation omitted). The Tenth Circuit has recognized: "A plainly erroneous jury instruction affects a defendant's 'substantial rights' if the instruction concerns a principal element of the defense or an element of the crime, thus suggesting that the error affected the outcome of the case." United States v. McSwain, 197 F.3d 472, 481 (10th Cir. 1999) (internal quotation marks and citation omitted); see also United States v. Perez, 43 F.3d 1131, 1139 (7th Cir. 1994)

(holding that erroneous jury instruction, which failed to include a "precise description of the requisite specific intent element," was plain error affecting defendant's substantial rights such that conviction had to be reversed); cf. United States v. Wilkinson, 137 F.3d 214, 228 (4th Cir. 1998) (finding third prong of Olano satisfied where district court failed to give the jury a conclusive instruction on element of materiality). Indeed, such practice "is consistent with the Supreme Court's instruction that due process 'requires proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged.'" Haywood, 363 F.3d at 207 (quoting In re Winship, 397 U.S. 358, 364 (1970)) (additional quotation marks and citation omitted). Here, the plainly erroneous jury instructions did not require the government to prove that Hammoud's purported "material support" for Hizballah went to further the organization's criminal conduct. As such, the convicted offense falls well short of the "personal guilt" and connection to "concededly criminal activity" which the Fifth Amendment requires. Scales, 367 U.S. at 224-25.

D.

Turning to Olano's requirement that the error seriously affected the fairness, integrity or public reputation of judicial proceedings, I note that when reviewing an erroneous jury instruction for plain error, "the relevant inquiry ... is whether, in light of the evidence presented at trial, the failure to instruct had a prejudicial impact on the jury's deliberations, so that it produced a miscarriage of justice." Havwood, 363 F.3d at 207. As the Seventh Circuit remarked in Perez, where the defendant carries his Olano burden of showing the erroneous jury instruction affected his or her substantial rights, "the gravity of such an error makes reversal the usual outcome." 43 F.3d at 1139 (citing United States v. Kerlev, 838 F.2d 932, 939 (7th Cir. 1988))/ see also United States v. Duran, 133 F.3d 1324, 1334 (10th

Cir. 1998) (holding plain error in jury instruction that allowed a conviction "where one important element may not have been found against the defendant by such a standard cannot be overlooked," and remanding for a new trial) (citation omitted). The Seventh Circuit reasoned that when a jury instruction is erroneous because it does not include the requisite specific intent requirement, "the error affects the integrity of the proceeding itself." Perez, 43 F.3d at 1140 (citations omitted).

Applying these principles in the instant case, I would find that the error affected the fairness, reputation and integrity of the judicial proceedings, thus we should vacate Hammoud's "material support" conviction and remand for a new trial. Had the district court judge charged the jury with the scienter requirement, it is highly unlikely that the jury could have convicted Hammoud based on the evidence offered at trial. Indeed, at the jury charge conference, the district court judge examined the language of Count 72 of the indictment, which alleged that Hammoud "used his position as a leader ... to foster support and raise funds for violent Hizballah activity," J.A. 482 ¶ 4(a), and stated: "There was no proof he raised funds for violent Hizballah activity. I have a problem leaving that in when you don't have any proof on that. But it's part of the indictment. I can't just take it out." J.A. 3251 (emphasis added). Accordingly, it is clear that the government failed to connect Hammoud to any terrorist activity on the part of Hizballah, rather it merely associated him with Hizballah, a foreign

terrorist organization.[15] This is not a case in which "overwhelming and essentially uncontroverted" evidence exists to support the conclusion that Hammoud supported Hizballah's illegal, terrorist activities, Cotton, 535 U.S. at 633, and in light of the lack of such evidence I would find that Hammoud suffered prejudice.

IV.

For these reasons, I would hold that the jury instruction upon which Hammoud was convicted of providing material support to Hizballah violated his Fifth Amendment rights, and Hammoud satisfied Olano's "plain error" standard, thus entitling him to a new trial. In recommending as much, I do not seek to give comfort to terrorist organizations, or to diminish the reality of clear and present threats posed by such groups. To the contrary, I seek to uphold the

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[15] It is further worth noting that not only did the government fail to connect Hammoud's purported $3,500 donation to Sheik Abbas Harake to any illegal purpose, or concededly criminal act, but the government could barely connect the funds to Harake to any degree whatsoever. The government admits that the only source of information indicating that Hammoud was sending money to Hizballah was Said Harb. Harb was described throughout the trial as untrustworthy, manipulative, a liar and an exaggerator. See, e.g., J.A. 1412, 1408, 2215, 2504. With reference to the alleged $3,500 in "material support" provided to Hizballah, Harb testified that he had once carried money to Harake for Hammoud. Id. at 2763. He testified that the money he carried was in an envelope which Hammoud said had two checks totaling $3,500. Id. at 2761-64. Harb testified that he spoke with Harake by telephone while in Lebanon, but never met with him and did not deliver money to him. J.A. 2764-66. Instead, Harb stated he "g[a]ve it [the envelope] to my mom and, you know, told her to make sure it gets to [Hammoud's] mom." Id. at 2765. Ostensibly, under the government's theory, Hammoud's mother gave the money to Harake, although I have found no testimony in the record completing this chain that allegedly stretched from Hammoud to Harake. Indeed, Harb never explained how the money got to Harake, nor did he state that he even spoke with Hammoud's mother to make sure she received the envelope, let alone spoke to Harake to assure that he received the envelope from Hammoud's mother. Despite these facts, the $3,500 transfer was the sole transaction offered by the government in support of Count 78 against Hammoud.

Constitution in a manner that does not harken back to a bleaker era of American history when characters were impugned, and individuals indicted, convicted and punished based on little more than suspicion, association and fear, without the "personal guilt" which is the hallmark of our criminal justice system. In applying AEDPA's material support provisions with the requisite scienter requirement, we may help insure that juries are not driven to findings of guilt by mere fear of the unknown, but instead arrive at the just result only after interrogation of the government's case to determine whether criminal intent is present.

I respectfully dissent.